(23,003)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 512.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. F. POLT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

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1-6 IN THE SUPREME COURT,
State of South Dakota, ss:

Be it remembered, that at a term of the Supreme Court of the State of South Dakota, begun and held at Pierre, State of South Dakota, on the first Tuesday of October A. D. 1910, on the 11th day of the term, to wit: on the 2nd day of November A. D. 1911.

Present: Ellison G. Smith, Presiding Judge, Dighton Corson, Dick Haney, Chas. S. Whiting and J. H. McCoy, Judges of said Court. The following proceedings were had and the following judgment was entered, to wit:

File No. 2906.

In the Supreme Court, State of South Dakota, October Term, A. D. 1910.

Present: Chas. S. Whiting, Presiding Judge, Dighton Corson, Dick Haney, Ellison G. Smith and J. H. McCoy, Judges of said Court, and the officers thereof.

J. F. POLT, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

This action coming on to be heard at the April A. D. 1910, Term of this Court at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case and without oral argument; and the Court having advised thereon and filed its decision in writing,

It is considered, ordered and adjudged, That the order and judgment of the Circuit Court, within and for Aurora County, appealed from herein, be and the same is hereby affirmed.

7 (*Remittitur.*)

And it is further ordered, That this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

And it is further ordered and adjudged, That respondent have and recover of the appellant costs and disbursements on this appeal, expended, taxed and allowed at Forty-two and no/100 Dollars.

By the Court,
[SEAL.]
CHAS. S. WHITING,
Presiding Judge.

Attest,
FRANK CRANE, *Clerk,*
By —— ——, *Deputy Clerk.*

STATE OF SOUTH DAKOTA,
County of Hughes, ss:

I, Frank Crane, Clerk of the Supreme Court, within and for the State of South Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete transcript and copy of the judgment of the Supreme Court of the State of South Dakota, in the above entitled action, wherein J. F. Polt is plaintiff and respondent versus Chicago, Milwaukee and St. Paul Railway Company a corporation, Defendant and Appellant, as the same now remains of record in said Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, this 21st day of September, A. D. 1911.

8–85 (Remittitur.)

FRANK CRANE, *Clerk,*
[SEAL.] (Signed) LESLIE PARRY,
Deputy Clerk.

Costs and disbursements taxed and allowed as follows:

Before Argument	$5.00
For Argument	15.00
Making and Serving Case	
Clerk's Fees to Perfect Appeal Record	
Printing Brief	22.00
Printing Abstract	
Printing Additional Abstract	
Fees Clerk of Supreme Court	
Total	$42.00

Endorsed on the back: File No. 1027. In Supreme Court, State of South Dakota, — Term, 19–, —— ——, Plaintiff and — vs. —— ——, Defendant and — Filed in open Court this 26 day of September 1911, (Signed) J. D. Stemler, Clerk. Remittitur. Judgment Book No. 6, Page 143.

* * * * * * *

86 In the Supreme Court in and for the State of South Dakota, April Term, A. D. 1910.

2906.

J. F. Polt, Plaintiff and Respondent,
vs.
Chicago, Milwaukee & St. Paul Railway, a Corporation, Defendant and Appellant.

Appeal from the Circuit Court of Aurora County, Hon. Frank B. Smith, Judge.

Abstract of Record.

J. D. Elliott, H. C. Preston, Attorneys for Defendant and Appellant. [Stamped:] Supreme Court, State of South Dakota. Filed. Mar. 10, 1910. Frank Crane, Clerk.

87 In the Supreme Court in and for the State of South Dakota, April Term, A. D. 1910.

J. F. Polt, Plaintiff and Respondent,
vs.
Chicago, Milwaukee & St. Paul Railway, a Corporation, Defendant and Appellant.

Appeal from the Circuit Court of Aurora County, Hon. Frank B. Smith, Judge.

ABSTRACT OF RECORD.

Complaint.

The plaintiff for a cause of action against defendant alleges:

I. That the defendant is a railroad corporation organized 88 and existing under and by virtue of the laws of the State of Wisconsin, and is authorized to do business in this state and owns and operates a railroad in this state.

II. That on the 21st day of March, 1908, the plaintiff was in possession of the premises described as the Southeast Quarter of Section Twenty-four, Township 103, Range 64, in Aurora County South Dakota, and was the owner of a large quantity of grain, farming machinery, tools, harness, live stock, and divers other articles of personal property, all of which was then stored and situated on the above described premises.

III. That on said 21st day of March, 1908, and for a long time prior thereto, the defendant owned and operated a line of railroad which passed near the premises above described. That on said 21st day of March, 1908, a fire was communicated and set by a locomo-

tive in use on defendant's said railroad to the grass on land adjoining said line of railroad, near the premises occupied by the plaintiff, and that said fire spread and communicated to the premises occupied by the plaintiff and burned, damaged and consumed a large quantity of the property of the plaintiff, consisting of 315 bushels of corn, 60 bushels of wheat, 150 bushels of oats, 60 tons of hay, three sets of harness, one hog, 60 chickens, one seeder, one planter, and a large quantity of farming machinery, carpenter tools, household furniture and utensils, and numerous other articles of
89 personal property, of divers kinds and descriptions, all of which was then stored and situated on the said above premises and was of the value of Eight Hundred and Thirty-eight Dollars and Twenty Cents ($838.20), to the damage of the plaintiff in the sum of Eight Hundred and Thirty-eight Dollars and Twenty Cents. ($838.20.)

IV. That on the 26th day of May, 1908, the plaintiff gave notice in writing to the defendant, accompanied by affidavit, that a loss had occurred to him by said fire as above stated, which said notice and affidavit were served upon the ticket and station agent of said defendant at Plankinton, in said Aurora County, South Dakota. That a true copy of said notice and affidavit is hereto attached, marked "Exhibit 'A,'" and made a part of this complaint.

V. That said defendant has failed and neglected and still fails and neglects to pay or compensate the plaintiff for the damage occasioned by said fire, although more than sixty days have elapsed since the service on said defendant of said notice of plaintiff's loss.

Wherefore, plaintiff demands judgment against the defendant for the sum of Sixteen Hundred and Seventy-six Dollars and Forty Cents ($1676.40), with interest thereon from the 21st day of March, 1908, and for costs of suit.

FELLOWS & COOK,
Plaintiff's Attorneys.

(Duly verified.)

90 To the Chicago, Milwaukee & Saint Paul Railway Company:

You are hereby notified: That on the 21st day of March, 1908, J. F. Polt was in possession of the premises described as the Southeast Quarter of Section 34, Township 103, Range 64, in Aurora County, South Dakota; and that he was on said date the owner of a large amount of hay, grain, chickens, hogs, harness, farming machinery, tools, utensils and fixtures, and household goods, utensils and fixtures; that on said 21st day of March, 1908, a fire was communicated by a locomotive in use upon the railroad of the Chicago, Milwaukee & Saint Paul Railway Company to grass adjoining its right of way, which fire spread and communicated to the premises occupied by the said J. F. Polt and destroyed a large amount of the property of said J. F. Polt, consisting of a large amount of hay, grain, chickens, hogs, harness, farming machinery, tools, utensils, and fixtures, and household goods, utensils and fixtures.

That the property so destroyed and its value is set out in detail in the itemized statement hereto annexed, marked "Exhibit A," and made a part hereof. That as shown by said Exhibit A. the value of the property destroyed as aforesaid is $838.20, and that the said J. F. Polt was damaged by fire in said sum of $838.20.

Dated May 23rd, 1908.

J. F. POLT.

91 STATE OF SOUTH DAKOTA,
County of Aurora, ss:

J. F. Polt, being sworn, says that he is the identical person described in and who signed the foregoing notice; that he has personal knowledge of the facts therein set forth and knows contents of said notice and of "Exhibit A" thereto attached and that the same are true in every particular.

J. F. POLT.

Subscribed and sworn to before me this 23rd day of May, 1908.

[SEAL.]
DONALD FELLOWS,
Notary Public, South Dakota.

"EXHIBIT A."

Seed corn, 15 bushels at $1.50 per bushel	$22.50
Corn, 300 bushels at $0.60 per bushel	180.00
Seed wheat, 60 bushels at $1 per bushel	60.00
Seed oats, 150 bushels at 45 cents per bu	67.50
One (1) hog	8.00
Washing machine	8.00
Chickens, 60 at 45 cents each	27.00
Hay, 60 tons at $3 per ton	180.00
Harness, 3 sets	60.00
Two (2) sets wagon sideboards and endgates	10.00
One (1) Grain King Scoop Board	5.00
One (1) barrel of salt	1.55
Three (3) plank slabs	5.00
92 Six (6) halters	6.00
One (1) barrel	1.00
Twelve (12) rods lath fence at $0.75	9.00
One (1) mail box	1.25
Sleigh bells	10.00
One (1) bitting harness	15.00
Pitchforks (4)	3.00
Hoe $0.50 and garden rake $0.65	1.15
Check row wire and spool, 160 rods, corn planter plates and two stakes	25.00
Three (3) sets double trees and single trees	6.00
One (1) buggy tongue and neck yoke	6.00
Hay knife (1)	1.00
Box tools	25.00
Two (2) Scoop shovels	2.00
One (1) Spade	1.50

One (1) galvanized bushel measure	1.00
Pig trough	.50
Seeder	20.00
Fanning mill	20.00
Cattle whip (1)	2.50
Two (2) sets leather fly nets	20.00
Two (2) store boxes	2.00
One (1) set cultivator shovels	4.00
One (1) coal scuttle	.50
Fishing poles (6)	1.50
Ten gallons lard at $1.50 per gallon	15.00
Nine (9) joints stove pipe and elbow	2.10
Milk can (1)	.65
Four (4) screens at 25 cents each	1.00
Total	$838.20

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Amended Answer.

The defendant for its amended answer to the plaintiff's complaint, by leave of court first had and obtained, herein states:

1st. Admits the incorporation of defendant.

2nd. Defendant alleges that it has no knowledge, information or belief as to the truth of the facts stated in paragraph 2 of plaintiff's complaint, therefore, denies the same.

3rd. Defendant denies each and every other allegation, matter and thing in plaintiff's complaint contained, not herein admitted or denied.

And for a further and second defense thereto, this defendant alleges

1st. That prior to the commencement of this action the plaintiff herein gave the defendant a notice in writing, accompanied by affidavit, that a loss had occurred to him by fire, on the 21st day of March, 1908, which was communicated by a locomotive in use upon defendant's railroad, to grass adjoining its right of way, which fire spread and communicated to the premises occupied by plaintiff and destroyed a large amount of plaintiff's property; consisting of hay, grain, chickens, hogs, harness, farming machinery, tools, utensils and fixtures and household goods, utensils and fixtures.

That the property, so destroyed, was of the aggregate value of $838.20, and that he had been damaged by reason thereof
94 in the destruction and loss of said property, as aforesaid, in the said sum of $838.20.

2nd. That within sixty days after service of said notice of loss and damage, as aforesaid, by the plaintiff herein, this defendant offered in writing to pay said plaintiff $500, being the full value of the damages sustained by him by reason of the injury and destruction by fire of the property set out and mentioned in the notice, so secured by plaintiff upon this defendant.

3rd. This defendant alleges that the plaintiff refused at all times to accept the said sum of $500, as the full amount of the damage sustained by him by reason thereof. That the amount of damage, if any, the plaintiff sustained by reason of said fire, as alleged in his complaint, did not, and does not, exceed the said sum of $500, but in truth and fact the said damage sustained is in a sum less than $500.

And for a third and separate defense, this defendant alleges:

1st. That it is and was at all times mentioned in plaintiff's complaint, a corporation for railroad purposes, duly organized and doing business under and by virtue of the laws of the state of Wisconsin.

2nd. That in about the year 1880, the defendant acquired a right of way across the land described in plaintiff's complaint for the construction of its road, and paid therefor a valuable con-
95 sideration, that there was then granted to this defendant the
right of way over the said premises for railroad purposes, that it subsequently constructed its railroad in the usual and ordinary manner; and that it has at all times occupied said premises for railroad purposes. That in the purchase and obtaining of said right of way, and payment of the consideration therefor, the damages of the kind and character contemplated by plaintiff's complaint, and in his cause of action herein, were considered, determined and fully receipted therefor.

And for a fourth and separate defense, this defendant alleges:

That the provisions of Chapter 215 of the Session Laws of this state for the year 1907, at page 448 thereof, Requiring Railroad Companies To Pay Double Damages In Certain Cases, conflicts with and violates and infringes the provisions of Sections 1, 2, and 18 of Article 6 of the State Constitution; and also of Section 1, of Article 14 of the Constitution of the United States, in that the said Law of 1907, makes an unjust discrimination in gratning privileges and immunities to citizens, classes and corporations, which upon the same terms are not granted to all, in that the said Law of 1907, and particularly Section 2 is an unlawful interference with the liberty and property of the citizen and corporation; in that it discriminates against the individual citizen or corporation in depriving of its property, so far as it exceeds the value of the property alleged
96 to have been injured and destroyed, in attempting to re-
cover double damages therefor, all of which is without due process of law, and therein and thereby, the defendant is denied the equal protection of the laws, in depriving it of its property,—that it singles out of all citizens and corporations, and requires them to pay in certain cases double damages to the party successfully suing them, while it gives them no corresponding benefit. And that such Law of 1907 attempts to punish this defendant for no wrong or act of negligence upon its part.

Wherefore, Defendant demands judgment that plaintiff's complaint be dismissed and for its costs and disbursements.

That in the event that plaintiff is entitled to recover a less sum as damages, than the amount so offered in the sum of $500, then the plaintiff shall recover only the damages, and the defendant shall recover its costs and disbursements.

B. H. SULLIVAN,
PRESTON & HANNETT,
Attorneys for Defendant.

CHAS. E. VROMAN,
Of Counsel.

(Duly Verified.)

Notice of Intention to Move for a New Trial.

To Fellows & Fellows, Attorney- for Plaintiff:

You will please take notice: That the defendant in the above entitled action intends to move the Court to set aside the verdict and judgment rendered herein, and to grant a new trial; that said application will be made upon the bill of exceptions to be hereafter settled, and upon the pleadings, papers, records and files in said cause; and upon the following grounds: 97

Errors in law occurring at the trial and objected to by the defendant.

That the verdict and judgment is against law.

Specifications wherein said errors of law, and that the verdict and judgment is against law, is contained in defendant's proposed bill of exceptions, a copy of which is herewith served upon you.

Dated at Mitchell, South Dakota, January 7th, 1910.

J. D. ELLIOTT,
H. C. PRESTON,
Attorneys for Defendant.

Stipulation and Order.

It is stipulated by and between the respective parties to this action that the within and foregoing proposed bill of exceptions, which has been amended by consent of the parties so as to include the plaintiff's proposed amendments to said proposed bill of exceptions, and that the said proposed bill of exceptions as amended, containing pages one to eighteen inclusive may be signed, settled and allowed by the Judge of said Court as the bill of exceptions in this action.

Dated at Mitchell, South Dakota, January 18th, 1910.

FELLOWS & FELLOWS,
Attorneys for Plaintiff.
J. D. ELLIOTT AND
H. C. PRESTON,
Attorneys for Defendant.

98 *Order.*

Upon reading and filing *and* foregoing stipulation and the Judge having examined the said proposed bill of exceptions and being fully advised in the premises Ordered that the within and foregoing bill of exceptions be and the same is hereby allowed and settled as the bill of exceptions in the above entitled action, and I certify that the said bill of exceptions contains all of the evidence produced upon the trial, together with a true statement of the objections to the offers of evidence, and the rulings of the Court thereon and the exceptions reserved thereto; and also contains a true and correct statement of all motions and proceedings had upon the trial, together with all orders and the rulings of the Court thereon in reference thereto and the exceptions thereto reserved; also a correct statement of the defendant's objection to the judgment being rendered thereon, together with the rulings of the Court and the exceptions reserved; as well as all proceedings in the case necessary to a full and complete determination thereof.

That the number of pages in said bill of exceptions contained are one to eighteen inclusive and as such I identify the same as constituting the bill of exceptions in this case and do order that the same be filed with the Clerk of the Circuit Court within and for Aurora County, South Dakota.

Dated this 28th day of January, A. D., 1910.

FRANK B. SMITH, *Judge.*

99 *Bill of Exceptions.*

The above entitled action came on for trial before the Court, the Honorable Frank B. Smith presiding, a jury duly empaneled to try the same on the 19th, day of February 1909 at Plankinton, South Dakota, the plaintiff appearing in person and by his attorneys Fellows & Fellows, the defendant appearing by its attorneys, H. C. Preston and B. H. Sullivan when the following proceedings were then had, as follows:

The defendant admits that portion of paragraph three of plaintiff's complaint, which reads as follows:

"That on said 21st, day of March 1908, a fire was communicated and set by a locomotive in use on the defendant's said railroad to the grass on land adjoining said line of railroad near the premises occupied by plaintiff."

Exhibit "A" is admitted in evidence, without objection, including the detailed statement attached to it. It is admitted that the same was served on the 26th day of May 1908 on the defendant. Exhibit "A" reads as follows:

(Same as attached to complaint.)

Plaintiff's Testimony.

J. F. **Polt** being duly sworn as a witness in his own behalf testified as follows:

Direct examination.

By Mr. **Fellows**:

"Q. Mr. Polt where do you live?

100 The defendant objects to the introduction of any testimony in this case for the reason the complaint fails to state a cause of action. Objection overruled. Defendant excepts.

"A. I live on what is known as the Kinyen farm in Aurora County, South Dakota, southeast of Plankinton. I moved there the first day of March, 1908. I know about the fire there on the 21st, day of March 1908 supposed to have come from the railroad. This place is situated somewhere about three quarters of a mile south of the railroad. This fire occurred somewhere between nine and eleven o'clock in the forenoon. I had some property at this place that was burned up. I had some three hundred bushels of corn burned. I had fifteen bushels of seed corn burned together with sixty tons of hay, one hog, one seeder, one fanning mill, six fish poles, nine joints of stove pipe, one elbow, coal shovel, garden rake, hoe, spade, two scoop shovels, two sets leather fly nets, three sets harness, two store boxes, sixty chickens, ten gallons lard, one bitting harness, one hundred sixty rods check wire and plate, my wagon, side boards and end gate, scoop board, sixty tons of hay burned, one hundred fifty bushels seed oats, sixty bushels of wheat and some other small articles that were burned. I know the value of the property. All of this property was burned up and was situated at the time on the Kinyen farm, part in the buildings and part out. The fire that caused this destruction was from the Milwaukee Railroad. It
101 started near the railroad track and run about a half mile south of my place. I was not at home at the time, but I saw where the fire had run. I was there before the fire was out. There was no other fire around there, except this one. The valuation I have placed upon the items is reasonable and a true valuation of the property. I have computed the amount. The total amount is $838.20. This valuation is based upon the condition of the property at the time of the fire March 21st, 1908. The hay that was destroyed was on the quarter section adjoining the Kinyen place on the west. It was destroyed. I have never received any compensation for any of it."

Cross-examination.

By Mr. **Preston**:

I was not at home at the time the fire started. I was about three miles south. When I reached the place part of the property was burning. Part of the property was around the barn yard there.

I know the quarter section upon which this property was destroyed. It was the Kinyen farm. I think it was the Southeast quarter of Section 24, Township 103-64. The railroad right-of-way did not run across the northern portion of the Southwest quarter of Section 24-103-64. The house and place where this property was situated and destroyed is about three quarters of a mile south of the railroad track. The fire showed for itself the course it took.

102 Redirect examination.

By Mr. Fellows:

This fire started somewhere around—between one hundred and one hundred forty feet south from the railroad track and run south. The wind that day was blowing from the north and carried the fire south, a little southeast. When the fire got down to the house it was over eighty rods wide.

Recross-examination.

By Mr. Preston:

There was much wind on that day of the fire. It was very heavy wind, almost a gale. The fire started on the quarter section right north of my place.

H. D. Meyers being duly sworn as a witness in behalf of the plaintiff testified as follows:

Direct examination.

By Mr. Fellows:

I live on Section five in Dudley township and before I moved down there I lived on the Kinyen place, the place where Mr. Polt lived, where this property is alleged to have been destroyed. On March 21st, 1908 I was living in Dudley. I moved there from the Polt place about the first of March. (This witness testified as to the condition of the property, belonging to the plaintiff and in addition as to the valuation, the details of which is not material to any question that will be presented in the defendant's application for a new trial).

103 J. C. Parrett being duly sworn as a witness in behalf of the plaintiff testified as follows:

Direct examination.

By Mr. Fellows:

I live about one and a half to two miles from the place where the plaintiff was living at the time of the fire. (Witness testified as to a part of the property owned by plaintiff and as to its valuation, which the defendant does not deem material in its application for a new trial.)

Mary Polt, being duly sworn as a witness in behalf of the plaintiff testified as follows:

Direct examination.

By Mr. **Fellows**:

I live on Kinyen farm where I resided with my husband, the plaintiff on March 31st, 1908, I think is the Southeast quarter of Section 24-103-64, southeast of town. The railroad track of the defendant is on the quarter section north of the one we resided on. I was home March 21st, 1908. I saw the train stop. I looked and saw a small fire. I think three men got off the back coach, they seemed to have some articles in their hands, like a broom or mop, or something of that description and came down towards the fire and I watched to see if they got the fire out but I saw the fire gain headway on them then I knew the fire would come to our place. I do not know how long they fought the fire. I presume they were fighting it, it looked like it and afterwards they got on the train
104 and went on. The same fire that these men got out and went to was the one that came to our house. This train was a freight train with a coach attached. The fire gained headway so I suppose they knew they could not control it and so they naturally left. The flames were real high when they left. The wind was north, a little northwest and it was blowing towards the southeast. There was no other fire out there that day than this one. It destroyed our property.

Cross-examination.

By Mr. **Preston**:

This train was going west. It was a freight train with a coach attached. The wind was blowing severely that morning—quite hard. The wind was in the northwest. I suppose I did not see the fire when it first started, but it was a very small fire when I first saw it. The fire moved rapidly and these men tried to put it out. When the men got over to the fire it was just beginning.

E. A. Turman being duly sworn in behalf of the plaintiff testified as follows:

Direct examination.

By Mr. **Fellows**:

I lived in Plankinton, South Dakota, on March 21st, 1908. I was hauling hay to Plankinton. I saw the fire which has been mentioned. This train was going west. I saw the fire when the way car of this freight train was about even with the fire. The fire went down to the Polt place. They stopped the train and got off.
105 The men had some brooms and shovels, I think, and were pounding around the place, but the wind was very strong and they could not seem to subdue it. The fire was running south when I first saw it, a little to the southwest, in the direction of the Kenyen place.

J. F. **Doyle**, being duly sworn as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. **Fellows**:

I live a half mile south of Plankinton. I was at home on the morning of March 21st, 1908, between nine and ten o'clock and I happened to see the freight stop down the track and pretty soon I saw smoke rising right close to the train and then I come on up town as far as the railroad track and I saw it was traveling pretty fast towards those buildings and I turned around and went down there as fast as I could with the horse and buggy. I know where Mr. Polt was living at that time and the fire looked to be straight north from his place. I cannot tell how long the train remained there exactly, it was there when I started. When I got down there the barn had just started to burn and the hay on the eighty just west of the Polt place was burned. Everything burned there as far as I could see, but the house. It was totally burned. The fire that I saw first south of the track, I am quite certain, was the same fire that burned Polt's property.

J. W. **Polt** being duly sworn as a witness in behalf of the plaintiff testified as follows:

106 Direct examination.

By Mr. **Fellows**:

I am a brother of the plaintiff. On March 21st, 1908 I was living about a mile west of town and on that day I was about three or four miles southeast of Plankinton. I got to my brother's place that morning between ten and eleven o'clock and found the barn on fire. His other property was all afire when I got there and destroyed. I saw no other fire in that vicinity on that day.

Plaintiff rests.

Defendant's Motion to Direct Verdict.

"Comes now the defendant, and moves the Court to direct the jury to return a verdict for the defendant for the reason:

That this action is brought to recover damages from defendant, under and by virtue of the Laws of 1907, of the State of South Dakota, being Chapter 215, requiring railroad companies to pay double damages in certain cases, when the provisions of said act conflict with, and violates and infringes the provisions of Sections 1, 2 and 18 of Article 6 of the State Constitution; and also of Section 1 of Article 14 of the Constitution of the United States, in that the said law of 1907 makes an unjust discrimination in granting privileges and immunities to citizens, classes and corporations, which upon the same terms are not granted to all, in that the said Statute

107 of 1907, and particularly Section 2, is an unlawful interference with the liberty and property of the citizen and corporation, in that it discriminates against the individual citizen or corporation in depriving it of its property, so far as it exceeds the value of the property alleged to have been injured and destroyed, in attempting to recover double damages therefor, all of which is without due process of law, and therein and thereby the defendant is denied the equal protection of the laws in the deprivation of its property; and it singles out all citizens and corporations and requires them to pay in certain cases double damages to the party successfully sueing them, while it gives them no corresponding benefit. That such a law of 1907 attempts to punish this defendant for no wrong or act of negligence upon its part.

That Sec. 1 of said statute violates Sec. 21 of Article III of the State Constitution, in that the subject matter contained in said Sec. 1 is not included or expressed in the title of said Act.

Finally, that no cause of action is stated in plaintiff's complaint, nor cause of action proven.

Motion denied. Defendant excepts.

It is admitted that defendant's Exhibit "1" was served by the defendant upon the plaintiff on the 22nd, day of July, 1908. Defendant offers in evidence Exhibit "1."

Objected to as incompetent and not a matter that ought to go to this jury. Objection overruled.

Exhibit "1" referred to reads as follows:

"To J. F. Polt:

108 You are hereby notified that the Chicago, Milwaukee & St. Paul Railway Company, a corporation, hereby offers to pay you Five hundred Dollars being the full amount of damages sustained by you, by reason of certain property being destroyed by a fire which you claim was communicated by a locomotive in use upon the Railroad of the said Chicago, Milwaukee & St. Paul Railway Company, Aurora County, South Dakota, on the 31st, day of March 1908, and for which loss and damage you have heretofore served notice in writing that such loss occurred accompanied by an affidavit thereof.

Dated July 22nd, 1908."

"CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY CO.,
By JOHN M. McDONALD, *Claim Agent.*"

Defendant rests.

At this time the defendant renews its motion to direct the jury to return a verdict in favor of the defendant and against the plaintiff for the same reasons given and stated in its motion to direct the jury to return a verdict at the close of the plaintiff's case. Motion denied. Defendant excepts.

Charge.

Whereupon the Court charged the jury as follows:

"Gentlemen of the jury, it is conceded that along about the 21st, of March, 1908, certain property belonging to the plaintiff was destroyed by fire, and he alleges that this fire was one set by the Milwaukee Railroad Company.

109 Now the first question, of course, for you to determine will be whether or not this property was as a matter of fact destroyed by a fire set or caused to be set by the train of this defendant railroad company. There is but very little to the case and there is no law I can give you on that except simply take the evidence and apply it to your knowledge and experience of affairs during your past life and say for yourselves whether or not this property was destroyed by a fire set by the defendant railroad company. Now if you find from a fair preponderance of the evidence that it was destroyed by such a fire, then you will determine how much the plaintiff's damages are. The plaintiff is entitled to recover a fair and reasonable compensation for the property which he has lost. The fair market value of the property, that is, the market value is the criterion by which you should be governed. There are some items in this list that it may be doubtful whether or not they have any such thing as market value. They have a value but that value must simply be what you think is a fair and reasonable value. Many of the articles, especially what we term second-hand articles, have no—there is no market for them. In other words, there is no market value that can be a guide, in such cases you must simply take the evidence and apply it to your judgment and experience as men and say what its fair and reasonable value was at the time it was destroyed.

110 Now while the jury are necessarily and in a measure bound by the evidence as to values, yet at the same time you are authorized to apply to that evidence your judgment and your experience as men and your knowledge of these things and say what in your mind is a fair and just and reasonable compensation for the loss which the plaintiff has sustained, taking the fair market value of such things as wheat, oats and corn, and a fair, reasonable, and just value of that property which cannot be said to have a market value. And when you have done that, the sum total of it will be the amount of damages which the plaintiff is entitled to recover. That is about all there is to the case.

As I say, the burden of proof is on the plaintiff to show by a fair preponderance of the evidence, first, that the property was destroyed by a fire set by the defendant company, and second, what his damages are.

You are the sole judges, of course, of the credibility of the witnesses and of the weight to be given to their testimony, and you should give to the testimony of each witness just such weight and just such credit as you think it is entitled to in view and in the light of all of the evidence. In case you find for the plaintiff, the form

of your verdict will be, "We, the jury, find for the plaintiff and assess his damages at" whatever you find them to be. In case you find for the defendant, it will simply be, "We, the jury, find for the defendant upon all of the issues in the case." I have
111 prepared forms of verdict and will send them out to you."

The defendant excepts to that part of the Court's charge to the jury wherein he stated in substance that the plaintiff is entitled to recover, if at all, the fair and reasonable market value of the property alleged to have been destroyed, and that the jury may determine such value.

Excepts to so much of said charge as charges the jury that when they had determined such valuation that will be the amount of the verdict of the jury.

Verdict.

Whereupon the jury returned the following verdict. (Omitting caption.)

"We, the jury, in the above entitled action find in favor of the plaintiff upon all the issues and assess his damages in the sum of Seven Hundred Eighty Dollars ($780.00)."

The jury having returned a verdict in favor of the plaintiff and against the defendant, the defendant at this time objects and protests to the entry of any judgment herein for the same reasons assigned in its motion to direct the jury to return a verdict in favor of the defendant and against the plaintiff at the close of all the testimony in the case when each party rested.

Stay of all proceedings for thirty days, and plaintiff shall give defendant ten days' notice of application of judgment.

112 *Order.*

Thereafter on March 10th, 1909 the Court did make the following order. (Omitting caption and signature.)

"The above entitled cause was tried at the February 1909, term of court held in said county. That the jury returned a verdict in favor of the plaintiff, and the court at the time made the order that no judgment be taken upon said verdict within thirty days, and that in the mean time the plaintiff's attorneys should give ten days' notice to the defendant's attorneys, in writing of the time and place that it would move for judgment upon said verdict.

Now, on motion of Preston & Hannett, attorneys for defendant, Ordered, that no judgment be rendered in the above entitled cause until after the plaintiff shall have first given ten days' notice to Preston & Hannett, attorneys for defendant, of the time and place for the hearing of plaintiff's motion for judgment herein, and until after said motion shall be heard and determined by the Court.

Dated at Mitchell, S. D., March 10th, 1909."

Notice of Motion.

That thereafter on the 12th, day of July 1909, the plaintiff did serve his notice of motion that he would apply for judgment upon the verdict rendered in this action, and which motion, omitting caption and signature reads as follows:

"To the above named defendant, and to B. H. Sullivan and Preston & Hannett, its attorneys:

113 Please take notice that the plaintiff above named will on the 13th, day of July 1909, at 11 o'clock, in the forenoon of said day, or — soon thereafter as counsel can be heard, at the chambers of the Court, in the City of Mitchell, Davison County, in said Fourth Judicial District, State of South Dakota, move the Court for judgment upon the verdict rendered in the above entitled action and now of record therein.

This motion is made and based upon all the files and records in this cause.

Dated Plankinton, South Dakota this 10th, day of July 1909."

Which said notice of motion was on the 12th, day of July, 1909 served on the defendant's attorneys, who then admitted service thereof, and waived the statutory time for notice, and consented to the submission of said motion at the time and place fixed by said notice.

Judgment.

That thereafter on the 22nd day of October 1909, the Court did render judgment in said cause, and which judgment omitting the caption and signature reads as follows:

"The above entitled action having been regularly placed on the calendar and coming on regularly for trial by jury on the 19th day of February, 1909, being a day of the regular February term of this court; the plaintiff appearing in person and by Fellows & Fellows, his attorneys and the defendant appearing by Preston & Hannett, its attorneys; and a jury having been regu- 114 larly impaneled and sworn, and having heard the evidence, the arguments of counsel and the instructions of the court, and having returned into court a verdict in favor of said plaintiff and against the defendant for the sum of Seven hundred and eighty dollars ($780.00) damages, and said verdict having been entered in the minutes of the court:

Now on motion of Fellows & Fellows, attorneys for the plaintiff, after due notice, as required by the order of this court and after hearing the arguments of counsel on said motion, it is by the Court Ordered, adjudged and decreed, that the plaintiff have and recover of the defendant the sum of One thousand five hundred and sixty dollars ($1,560.00), being double the amount of damages so, as aforesaid, found by said jury, with interest thereon from said 19th day of February 1909, at the rate of seven per cent, per annum, amounting in the whole at this date to the sum of One thousand six hundred thirty-two dollars and eighty cents ($1,632.80) together with the sum of Eighty-two dollars and fifty-five cents ($82.55), his costs and disbursements herein, to be taxed and inserted in this judgment by the clerk, amounting in the whole to the sum of 1,715 dollars and 35 cents.

Done at Mitchell, South Dakota this 22nd day of October, 1909."

115 That the foregoing judgment was filed and entered in the office of the Clerk of the Circuit Court in and for said Aurora County, on the 23rd day of October, 1909.

Orders Extending Time.

That on the 15th day of October, 1909, the Court extended the time in which the defendant might prepare and settle a bill of exceptions, give notice of intention to move for a new trial and to move for a new trial, for a period of sixty days, and that, in the mean time, all proceedings should be stayed, and which order was made upon good cause shown to the Court.

By stipulation of the respective parties, December 20th, 1909, for good cause shown to the Court, the Court extended the time for the defendant to prepare and serve a proposed bill of exception, to give notice of intention to move for a new trial, and to move for a new trial, up to and including the 1st day of February, 1910.

Assignment of Errors.

The defendant says there is manifest error upon the record and upon which it will rely in its application to the trial court for a new trial therein.

Errors in Law.

The following errors in law occurring at the time of the trial and excepted to by the defendant.

1.

116 The court erred in overruling the defendant's objection at the commencement of the trial, in which it objected to the receipt of any testimony in the case, for the reason that the complaint does not state a cause of action.

2.

The court erred in denying defendant's motion, at the close of plaintiff's case, to direct the jury to return a verdict for the defendant, for the reasons stated in said motion.

3.

The court erred in not sustaining defendant's motion to direct the jury to return a verdict in favor of the defendant for the reasons therein stated, and which motion was made after both plaintiff and defendant had rested their case.

4.

The court erred in its charge to the jury, and to which the defendant at the time excepted, wherein the court stated, in substance that the plaintiff is entitled to recover, if at all, the fair and reasonable market value of the property alleged to have been destroyed, and that the jury might determine such value; also to that part of the charge of the court, that when the jury had determined such valuation that the same would be the amount of the verdict to be returned by the jury.

5.

The court erred in rendering judgment therein over the defendant's objections and protests, for the reasons assigned in the defendant's motion to direct the jury to return a verdict in favor of
117 the defendant, at the close of the testimony in the case when each party rested.

6.

The court erred in sustaining plaintiff's motion for judgment over the defendant's objections, and in rendering judgment in the sum of One thousand seven hundred fifteen dollars and thirty-five cents ($1715.35.)

Against Law.

The verdict of the jury and judgment rendered by the Court is not justified as, Against Law.

Specifications.

(*a*) The complaint states no facts, claiming or disclosing negligence on the part of the defendant.

(*b*) The action is brought and maintained under Chapter two hundred fifteen of the Session Laws of 1907 of this State. The said Act violates Sections, one, two and eighteen of Article six of our State Constitution, and also Section twenty-one of Article three; it also violates Section one of Article four of the Federal Constitution.

(*c*) Section two of said Act of 1907 has for its object the obtaining of double damages as expressed in its Title.

(*d*) That the Act seeks to create an absolute liability, without negligence, and inflicts a penalty additional when the railroad company is doing a lawful act and in no manner violates law.

118 (*e*) Double damages are exemplary and some duty first imposed must be violated.

(*f*) Excess of actual damages can only be obtained in the event of negligence, or failure to do some duty by law imposed.

(*g*) The penalty imposed by this Act is not because of negligence, but because the railway company fails to pay a debt or obligation; which rule regulates the payment of debts by railroad companies and is different from that prescribed for the payment of debts by others—therefore, class legislation.

(*h*) Section one of said Act of 1907 is void, because Section two thereof is unconstitutional and there is no Title to said Act that will sustain Section one. Section twenty-one of Article three, of our State Constitution provides, "No law shall embrace more than one subject, which shall be expressed in its Title." This Act is not separable and does not treat of both subjects, single and double damages.

(*i*) That the defendant herein is entitled to the equal protection of the laws guaranteed it by the State and Federal Constitutions; that it cannot be singled out and required to pay, in certain cases, double damages to the parties successfully suing it, while it gives to it no corresponding benefit.

Dated at Mitchell, South Dakota, January 7th, 1910.

J. D. ELLIOTT,
H. C. PRESTON,
Attorneys for Defendant.

119 *Motion for New Trial.*

To Fellows and Fellows, Attorneys for Plaintiff:

Please take Notice, that the defendant in the above entitled action will move the Court to set aside the verdict and judgment rendered and entered herein and to grant a new trial of said action; that said motion will be made upon the settled bill of exceptions, and upon all of the files, papers, records and pleadings in said cause for the following reasons:

1.

Errors in law occurring at the time of the trial and objected to by defendant.

(*a*) The Court erred in overruling defendant's objection, at the commencement of the trial, in which it objected to the receipt of any testimony in the case, for the reason that the complaint fails to state a cause of action.

(*b*) The Court erred in denying defendant's motion at the close of plaintiff's case, to direct the jury to return a verdict for the defendant, for the reasons stated in said motion.

(*c*) The Court erred in not sustaining defendant's motion to direct the jury to return a verdict in favor of the defendant for the reasons stated, which motion was made after both sides had rested.

(*d*) The Court erred in its charge to the jury, wherein the Court stated, in substance, that the plaintiff is entitled to recover, 120 if at all, the fair and reasonable value of the property alleged to have been destroyed, and that the jury may determine such value; also to that part of the charge of the Court, saying that when the jury had determined such valuation, that the same would be the amount of the verdict to be returned.

(*e*) The Court erred in rendering judgment over the defendant's objections and protests for the reasons assigned in the defendant's motion to direct the jury to return a verdict at the close of the testimony offered and received in the case.

(*f*) The Court erred in sustaining plaintiff's motion for judgment over the defendant's objections and rendering judgment in the sum of One thousand seven hundred and fifteen dollars and thirty-six cents ($1715.36).

2.

The verdict of the jury and judgment rendered by the Court is against law.

(*a*) The complaint states no facts, claiming or disclosing negligence on the part of the defendant.

(*b*) The action is brought and maintained under Chapter two hundred fifteen of the Session Laws of 1907 of this State. The said Act violates Sections one, two and eighteen of Article six of our State Constitution, and also Section twenty-one of Article three; it also violates Section one of Article four of the Federal Constitution.

(*c*) Section two of said Act of 1907 has for its object the
121 obtaining of double damages as expressed in its Title.

(*d*) That the Act seeks to create an absolute liability, without negligence, and inflicts a penalty additional when the railroad company is doing a lawful act, and in no manner violates law.

(*e*) Double damages are exemplary and some duty first imposed must be violated.

(*f*) Excess of actual damages can only be obtained in the event of negligence, or failure to do some duty by law imposed.

(*g*) The penalty imposed by this Act is not because of negligence, but because the railway company fails to pay a debt or obligation; which rule regulates the payment of debts by railroad companies and is different from that prescribed for the payment of debts by others,—therefore, class legislation.

(*h*) Section one of said Act is void, because Section two thereof is unconstitutional and there is no Title to said Act that will sustain Section one. Section twenty-two of Article three of our State Constitution provides, "No law shall embrace more than one subject, which shall be expressed in its Title." This Act is not separable and does not treat of both subjects, single and double damages.

(*i*) That the defendant herein is entitled to the equal protection of the laws guaranteed it by the State and Federal Constitutions; that it cannot be singled out and required to pay, in certain
122 cases, double damages to the parties successfully suing it, while it gives to it no corresponding benefit.

Dated at Mitchell, South Dakota this 25th day of January, A. D., 1910.

J. D. ELLIOTT,
H. C. PRESTON,
Attorneys for Defendant.

It Is Stipulated between the respective parties to this action that the foregoing motion for a new trial may be heard and determined by the Court, at the Court House, in Mitchell, South Dakota, at the chambers of the Judge, on Saturday the 29th day of January A. D. 1910, waiving time.

FELLOWS & FELLOWS,
Attorneys for Plaintiff.
J. D. ELLIOTT,
H. C. PRESTON,
Attorneys for Defendant.

Order Denying New Trial.

The motion for a new trial in the above entitled action coming on for trial before the Court, at the Court House in the city of Mitchell, South Dakota at the time and place mentioned in the stipulation between the respective parties hereto, for the hearing on said motion to be held on Saturday, January 29th, A. D. 1910, waiving time, and the Court after hearing the respective parties, in support of and against said motion, and after being fully advised in the premises,

123 Ordered that the Motion for a new trial be, and the same is in all things denied.

Dated at Mitchell, South Dakota, January 29th, 1910.
By the Court:
FRANK B. SMITH, *Judge.*
Attest:
J. D. STEMLER, *Clerk.*

To the foregoing order the defendant at the time excepts, which exception is allowed.

Dated January 29th, 1910.
By the Court:
FRANK B. SMITH, *Judge.*

The foregoing Order denying a new trial was duly filed in the office of the Clerk of the Circuit Court within and for Aurora County, South Dakota, duly and properly entered and recorded therein on the 29th day of January A. D., 1910.

Notice of Appeal.

To Fellows & Fellows, Attorneys for the above named Plaintiff and to J. D. Stemler, Clerk of said Circuit Court:

Please take Notice, that the Chicago, Milwaukee & St. Paul, Railway Company, a corporation, the defendant in the above entitled action, appeals from the judgment entered therein, on the 23rd day of October A. D., 1909, in favor of the plaintiff and against the defendant for One thousand seven hundred fifteen dollars and thirty-five cents ($1.715.35); and from the order denying a new

124 trial in said above entitled action, entered on the 29th day of January A. D., 1910, to the Supreme Court of the State of

South Dakota. Said appeal is taken from the whole of said judgment and order.

J. D. ELLIOTT,
H. C. PRESTON,
Attorneys for Defendant and Appellant.

Service of the foregoing notice of appeal is admitted at Plankinton, South Dakota this 1st day of February A. D., 1910, by receipt of copy.

FELLOWS & FELLOWS,
Attorneys for Plaintiff and Respondent.
J. D. STEMLER,
Clerk Circuit Court.

Undertaking on Appeal.

Whereas, on the 22nd, day of October, A. D., 1909 in the Circuit Court within and for Aurora County, the above named plaintiff and respondent recovered a judgment against the above named defendant and appellant for One thousand seven hundred fifteen dollars and thirty-five cents, ($1,715.35) and which judgment was entered and docketed in the office of the Clerk of the Circuit Court aforesaid, on the 23rd, day of October, A. D., 1910.

And the above named defendant and appellant feeling aggrieved hereby, intends to appeal therefrom to the Supreme Court of the State of South Dakota.

125 Now Therefore, We do hereby undertake that the above named defendant and appellant will pay all costs and damages which may be awarded against it, the said defendant and appellant, on said appeal, or on a dismissal thereof, not exceeding Two hundred and fifty Dollars ($250.00); and we do also undertake that if the said judgment so appealed from, or in any part thereof, be affirmed, or said appeal be dismissed, the said defendant and appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs that shall be awarded against said defendant and appellant on said appeal.

Dated this 31st, day of January A. D., 1910.

CHICAGO, MILWAUKEE & ST.
PAUL RAILWAY CO.,
By its Attorney, H. C. PRESTON,
CLARE A. DAVISON,
D. B. MILLER.

STATE OF SOUTH DAKOTA,
County of Davison, ss:

On this 31st, day of January A. D., 1910 before me, A. S. Reid, a Notary Public in and for said County and State, personally appeared Clare A. Davison and D. B. Miller, known to me to be the same persons described in and who executed the foregoing undertaking and severally acknowledged to me that they executed the same.

126 In Witness Whereof I have hereunto set my hand and Notarial Seal the day and year last above written.

[SEAL.]

A. S. REID,
Notary Public, South Dakota.

STATE OF SOUTH DAKOTA,
County of Davison, ss:

Clare A. Davison and D. B. Miller, being duly sworn, each for herself and himself says, said Clare A. Davison says that she is a resident and freeholder of the County of Davison and of this State; that she is worth the sum of Five thousand dollars over and above all her debts and liabilities, exclusive of property exempt from levy and sale on execution, in property within this State.

And said D. B. Miller says that he is a resident and freeholder of the County of Davison and of this State; that he is worth the sum of Five thousand dollars over and above all his debts and liabilities, exclusive of property exempt from levy and sale on execution, in property within this State.

CLARE A. DAVISON.
D. B. MILLER.

Subscribed and sworn to before me this 31st, day of January A. D., 1910.

[SEAL.]

A. S. REID,
Notary Public, South Dakota.

127 I certify that I find the sureties in the above and foregoing undertaking sufficient, and do approve and allow the same.

J. D. STEMLER,
Clerk of the Circuit Court within and for
Aurora County, South Dakota.

Due and personal service of the foregoing undertaking is admitted by copy thereof, at Plankinton, South Dakota this 1st day of February, A. D., 1910.

FELLOWS & FELLOWS,
Attorneys for Plaintiff and Respondent.

The notice of appeal and undertaking were each filed in the office of the Clerk of said Circuit Court on February 3d, 1910.

Assignment of Errors.

The appellant herein says there is manifest error on the face of the record, in this, and upon which it will rely for a reversal of the judgment, and order denying a new trial, and upon its appeal to the Supreme Court of this State.

1.

The Court erred in overruling the defendant's objection at the commencement of the trial, in which it objected to the receipt of any testimony in the case, for the reason that the complaint does not state a cause of action.

2.

128 The Court erred in denying defendant's motion, at the close of the plaintiff's case, to direct the jury to return a verdict for defendant, for the reasons stated in said motion.

3.

The court erred in not sustaining defendant's motion to direct the jury to return a verdict in favor of the defendant for the reasons therein stated, and which motion was made after both plaintiff and defendant had rested their case.

4.

The Court erred in its charge to the jury, and to which the defendant at the time excepted, wherein the Court stated, in substance that the plaintiff is entitled to recover, if at all, the fair and reasonable market value of the property alleged to have been destroyed, and that the jury might determine such value; also to that part of the charge of the court, that when the jury had determined such valuation that the same would be the amount of the verdict to be returned by the jury.

5.

The Court erred in rendering judgment therein over the defendant's objections and protests, for the reasons assigned in the defendant's motion to direct the jury to return a verdict in favor of the defendant, at the close of the testimony in the case when each party rested.

6.

129 The Court erred in sustaining plaintiff's motion for judgment over the defendant's objections, and in rendering judgment in the sum of One thousand seven hundred fifteen dollars and thirty-five cents ($1715.35.)

7.

The Court erred in rendering judgment in favor of the plaintiff and against the defendant.

8.

The Court erred in denying appellant's motion for a new trial in the said entitled action.

Specifications.

(*a*) The complaint states no facts, claiming or disclosing negligence on the part of the defendant.

(*b*) The action is brought and maintained under Chapter two hundred fifteen of the Session Laws of 1907 of this State. The said Act violates Sections one, two and eighteen of Article six of our State Constitution, and also Section twenty-one of Article three; it also violates Section one of Article four of the Federal Constitution.

(*c*) Section two of said Act of 1907 has for its object the obtaining of double damages as expressed in its Title.

(*d*) That the Act seeks to create an absolute liability, without negligence, and inflicts a penalty additional when the railroad company is doing a lawful act and in no manner violates law.

(*e*) Double damages are exemplary and some duty first imposed must be violated.

130 (*f*) Excess of actual damages can only be obtained in the event of negligence, or failure to do some duty by law imposed.

(*g*) The penalty imposed by this Act is not because of negligence, but because the railway company fails to pay a debt or obligation; which rule regulates the payment of debts by railroad companies and is different from that prescribed for the payment of debts by others, therefore, class legislation.

(*h*) Section one of said Act is void, because Section two thereof is unconstitutional and there is no Title to said Act that will sustain Section one. Section twenty-one of Article three, of our State Constitution provides, "No law shall embrace more than one subject, which shall be expressed in its Title." This Act is not separable and does not treat of both subjects, single and double damages.

(*i*) That the defendant herein is entitled to the equal protection of the laws guaranteed it by the State and Federal Constitutions; that it cannot be singled out and required to pay, in certain cases, double damages to the parties successfully suing it, while it gives to it no corresponding benefit.

J. D. ELLIOTT,
H. C. PRESTON,
Attorneys for Defendant and Appellant.

131 And afterwards, to wit; on the fifteenth day of March, A.D. One Thousand Nine Hundred Ten, the cause was placed on the calendar for the April A. D. One Thousand Nine Hundred Ten Term of said Court, and afterwards, to wit: on the twenty-seventh day of May, A. D. One Thousand Nine Hundred Ten, the cause was submitted and taken under advisement by the Court, and afterwards, to wit: on the second day of November A. D. One Thousand Nine Hundred Ten, the judgment of the lower court was affirmed, the opinion handed down being in words and figures as follows, to wit:

132 In the Supreme Court, State of South Dakota.

J. F. POLT, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

Appeal from the Circuit Court of Aurora County.

Opinion filed Nov. 2, 1910.

133 J. D. Elliot, H. C. Preston, for Appellant.
Fellows & Fellows, for Respondent.

SMITH, *J.:*

Respondent commenced an action in the Circuit Court of Aurora County, to recover damages, under Chapter 215, Laws of 1907, requiring "Railroad Corporations to Pay Double the Amount of Damages Incurred by Fires Communicated by Locomotive Engines." On July 22nd, 1908, appellant served upon respondent an offer in writing to pay him $500.00 in full for his damages. On the trial, a verdict was returned in favor of respondent for $780.00. Later respondent served a notice of motion for judgment, and the court directed a judgment in double damages, together with costs, and thereupon, a total judgment of $1715.35 was entered against appellant. The only questions presented on this appeal relate to the constitutionality of the act under which the judgment for double damages was entered. It is strenuously urged by appellant that the act of 1907, attempting to impose double damages is unconstitutional. It is conceded by appellant that such damages are penal in character, and that a railroad company may be required to pay double damages where there has been a violation of some specific duty. It is contended, however, that the failure of duty for which such penalty may be imposed must be one which itself contributes to the injury. It is urged that this act of 1907 creates a debt, an absolute liability, as soon as the injury occurs, with no possible defense thereto, and the only question which can be litigated is the amount of appellant's damages; and that because the parties may fail to agree as to the amount, and suit is brought in the courts to determine the controversy, where the railroad company is unsuccessful, and the damages assessed are one cent more than the sum offered by
134 the company, then the defendant is penalized in double the amount of actual damages, and this with no corresponding liability upon the plaintiff for a failure to agree upon the amount, except the imposition of costs. It is strenuously urged that no class of persons can be singled out and required to pay a penalty for the privilege of appealing to the courts, and that the company may escape double damages only, by failing to exercise its privilege of resisting in a court of justice, a debt which, in amount, it deems unjust. Our attention has not been called to any decision holding that

the violation of duty for which such a penalty may be imposed by statute, must be a violation of a duty which contributes directly to the specific injury complained of. It is true, that in most instances, the duties for a violation of which double damages are imposed are duties tending to guard against injuries which may result in some manner, from the operation of railroads, but no case has been cited which holds that a failure on the part of the company to pay actual damages, may not be penalized by statute. It is plain that the statute under consideration does not by any of its provisions, attempt to penalize the railroad company because of its failure to comply with any specific duties arising in the operation of the railroad, but that its liability for actual damages for such injuries becomes absolute and fixed whenever the injury occurs, irrespective of whether the company has been guilty of negligence or a violation of any duty imposed upon it by law. It would seem, therefore, that the only duty the failure to perform which is penalized by this statute, is the duty to ascertain and pay actual damages for injuries within 60 days after notice. It may conceded, as contended by appellant, that this
statute creates an absolute liability for injuries which renders
135 immaterial all questions as to negligence in the operation of
railroad trains, as well as failure to comply with statutory requirements, such as fences, cattle guards, etc., but it also prescribes and creates a duty, on the part of the company, to correctly ascertain and tender the amount of actual damages, within 60 days after notice of the injury. The penalty is not imposed because of litigation which may follow the injuries but because it is made the duty of the company, both to correctly ascertain and to offer to pay the damages. If such a statutory requirement is a proper exercise of police power, it violates no constitutional right. The duty thus imposed may be one of the greatest difficulty and may result in injustice in many instances, but this court cannot say that it is impossible of performance. It may be conceded that a legislative act which should attempt to create an absolute liability to pay double the actual damages in every case of injury, where no failure of any duty, within the scope of police power or control is involved, might be a questionable exercise of legislative power. But if it be conceded that this duty to correctly ascertain the actual damages, is one which may be imposed as an exercise of police power, such an enactment cannot be held to interfere with any constitutional right. The weight of judicial opinion seems to us to sustain the proposition that such a requirement is a proper exercise of police power. In the case of Jensen v. South Dakota entral Railway Co., infra, this court said: "Another ground for the exercise of such police power found in the enactments in question is; that the injury actually received in such cases is often so small that in many cases, no effort would be made by the sufferer to obtain redress, if the private interest was not supported by the im-
position of some punitive damage. Such seem to be the prin-
136 ciples established by the following authorities: M. & St. L. Ry.
Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; Welsh v. C. B. & Q. Ry. Co. 53 Iowa, 632, 6 N. W. 13; Bennett v. Wabash Ry. Co. 61 Iowa, 355, 16 N. W. 210; Mo. Pac. Ry. Co. v.

Humes, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; Atchison, T. & S. F. Ry. Co. v. Mathews, 174 U. S. 96, 19 Sup. Ct. 609, 43 L. Ed. 909; Freund on Police Power, P. 630-637." The proposition involved is identical with that decided by this court in Jensen v. South Dakota Central Railway Co., 127 N. W. 650, and that case must be held to be decisive of this appeal. The order and judgment of the trial court are therefore affirmed.

137 And afterwards, to wit: on the sixteenth day of November A. D. One Thousand Nine Hundred Ten, a petition for rehearing was filed, which said petition is in words and figures as follows, to wit:

138 In the Supreme Court of the State of South Dakota, October Term, 1910.

J. F. POLT, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporaporation, Defendant and Appellant.

Petition for Rehearing.

Comes now the above named appellant, Chicago, Milwaukee and St. Paul Railway Company, by H. C. Preston and J. D. Elliott, its attorneys, and within the time provided by the rules of this Court, makes, serves, and files, this, its petition for a rehearing, and as grounds therefor respectfully shows:

I.

The Court erred in its consideration of the statuute of 1907 in its holding and decision that the defendant is penalized in double the amount of actual damages only when the railroad company is unsuccessful and the damages assessed are one cent more than the sum offered by the Company, as appears by that paragraph of the opinion reading as follows:

> "And that because the parties may fail to agree as to the amount and suit is brought in the courts to determine the controversy, where the railroad company is unsuccessful, and the damages assessed are one cent more than the sum offered by the company, then the defendant is penalized in double the amount of actual damages. * * *"

for the reason that the said portion of said opinion clearly assumes a provision which is not contained in said law. The provisions of said law are such that if the owner of the property recovers the identical amount, being the full amount of the loss, offered to be paid by the defendant company, within the time named in said statute still the company is required to pay double the amount of the loss, and all costs.

II.

139 The Court was mistaken when it held and considered that in case suit was brought against a railway company, under the statute of 1907, for loss by fire.

"and the damages assessed are one cent more than the sum offered by the company"

then the defendant is penalized in double the amount of actual damages, for the reason that under the provisions of said statute, plainly the damages assessed must be less than the full amount of the damages actually sustained and thereafter and within the time named in the statute, offered by the railway company.

III.

As appears from the opinion of the Court, the Court did not consider the fact that Chapter 215 of the Session Laws of South Dakota, A. D. 1907, does not limit its provisions to fires set by locomotive engines in use upon a railroad owned and operated by a corporation, but also applies with equal force to a fire set by the employés of a railway corporation "by burning of grass, weeds or rubbish on right of way" and does not apply to other persons or their employés in the setting of fires and is therefore an unjust discrimination against the railway corporations.

IV.

The Court made a mistake in not considering also the fact as appears by the provisions of said Chapter 215 of the Session Laws of South Dakota, A. D. 1907, that the law of 1907 has no application to, and in no manner affects a railroad owned by an individual or by any association of individuals other than a corporation, and said statute is therefore an effort upon the part of the Legislature to arbitrarily select one class of railway operators within the state and visit a penalty upon them which is not imposed upon others guilty of like delinquincy.

V.

We respectfully submit that in the opinion the Court states

"Our attention has not been called to any decision holding that the violation of duty for which such a penalty may be imposed by statute, must be a violation of a duty which contributes directly to the specific injury complained of."

140 We insist that this is error for the reason that the Supreme Court of the United States held in Gulf C. & S. F. R. Co. vs. Ellis, 165, U. S. 150, as follows:

"But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation."

We earnestly urge that a recognition of the principle thus announced by the Supreme Court of the United States eliminates all that is embraced in the quotation above set forth, which is the basis upon which rests the constitutionality of this statute, under the terms of the decision in this case.

VI.

The Court, as we believe, made a mistake in said opinion where it recites:

"But no case has been cited which holds that a failure on the part of the company to pay actual damages may not be penalized by statute"

and the Court's attention is respectfully called to

> Gulf C. & S. F. R. Co. vs. Ellis, 165 U. S. 150; 41 Fed. 66; 17 Sup. Ct. Rep. 255;

and the Court's attention is especially called to that class of cases referred to in the brief as "an attempt to grant special advantages to one class of litigants at the expense of another," beginning at the foot of page 19 of appellant's brief and ending at page 29, that entire portion of the brief being devoted to the questions involved in this suggestion of the Court.

VII.

There is error and mistakes on the part of the Court in the following particulars, to wit:

1. In holding that the penalty of double damages is imposed by the statute in question, not because of litigation which may follow the injury but because it is made the duty of the company both to correctly ascertain and to offer to pay the damages and that such statutory requirement is a proper exercise of police power,
141 and in holding that such requirement violates no constitutional right.

2. In holding that "the injury actually received in such cases is often so small that in many cases, no effort would be made by the sufferer to obtain redress if the private interest was not supported by the imposition of some punitive damages." We urge error in this assignment in that the statute itself does not pretend to be of the kind or class named in the citations in the opinion to support the above quotation. We respectfully call the court's attention to the fact that in those cases referred to, the statute invariably represented an attorney's fee and was confined to cases representing not more than a small sum named in the statute, except in the cases involving negligence, which would have no application here; and the terms of this statute do not pretend to aim to protect the laborer, or the mechanic, or the poor, for its benefits are conferred upon every individual in the state, rich or poor, high or low, who has a claim of the character described in the statute. It is not a statute for the protection of particular classes of individuals supposed to need protection, but it is a punishment of railway corporations on account

of their delinquincy in paying a debt within sixty days after notice of loss by a claimant.

3. Referring again to the holding of the Court that this statute may be sustained as a proper means of enforcing the payment of small debts, we urge that this statute does not justify that view and the legislature has not brought it within the terms of statutes intended for the enforcement of the payment of small debts and preventing any unnecessary litigation in respect to them because it does not impose the penalty in all cases where the amount in controversy is within a limit named in the statute.

4. We urge the Court erred in sustaining this statute for the reason that upon its face the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform its duty to pay within the time named in the statute, a duty which is equally obligatory upon every debtor; a punishment not visited by reason
142 of failure to comply with any proper police regulation, or for the protection of the laboring classes, or to prevent litigation about trifling matters.

5. We earnestly urge the Court should consider that the Legislature has arbitrarily selected railway corporations and visited a penalty upon them for the non-payment of this debt placed upon them by the statute itself, and for such non-payment has imposed upon such corporations a penalty not imposed upon others guilty of like delinquency; that this is not within the police power and this statute should not therefore be sustained.

VIII.

We urge the Court to consider that the terms of this statute arbitrarily place this penalty upon a railway company for failure to ascertain and pay amount of its liability within a specified time; that the same obligation rests upon it whether the fire is set by an engine concededly a dangerous instrumentality, or whether it is set by employés in burning the right of way, which is certainly no more dangerous that when rubbish and grass is burned from the adjacent land and prairies by its owners. That this arbitrary selection should not be justified by calling it classification and this defendant, we respectfully submit, in this action, is entitled to the protection demanded by the Fourteenth amendment of the Constitution of the United States. And the plaintiff herein seeks in this action to deprive defendant of its property without due process of law and the enforcement of this statute amounts to the taking of defendant's property without just compensation, and is in violation of the protection guaranteed to the defendant by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted:

(Signed) H. C. PRESTON,
(Signed) J. D. ELLIOTT,
Attorneys for Defendant and Appellant.

143–147 Endorsed on the Back: 2906. In Supreme Court, State of South Dakota. J. F. Polt, Plaintiff and Respondent, vs. C. M. & St. P. Ry. Co. a Corporation, Defendant and Appellant. Petition for Rehearing. Supreme Court, State of South Dakota. Filed Nov. 16, 1910. (Signed) Frank Crane, Clerk. Elliott & Stillwill Attorneys for D'f't and Appellant. Aberdeen, South Dakota.

* * * * * * *

148 And afterwards, to wit: on the nineteenth day of September A. D. One Thousand Nine Hundred Eleven, the said petition for rehearing was denied, and afterwards, to wit: on the twenty-eighth day of October A. D. One Thousand Nine Hundred Eleven, a petition for writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota was filed and allowed, which said petition for writ of error is, in letters and figures, as follows, to wit:

149 In the Supreme Court of the State of South Dakota, October Term, 1911.

J. F. POLT, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota.

Now comes the above named defendant and appellant by William G. Porter and H. C. Preston, its attorneys, and complains and alleges:

I.

That on the 2nd day of November, 1910 the Supreme Court of the State of South Dakota, made and entered a final judgment herein in favor of said respondent and against the said appellant, and on the 19" day of September, 1911, denied an application for rehearing in said case in which said final judgment, and said final judgment on rehearing, and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the said defendant and appellant all of which will more in detail appear from the assignment of errors which is filed with this petition. That the said Supreme Court of the State of South Dakota is the highest court of the said State in which a decision in this action and in this matter could be had. That the appellant is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin and doing business in, and having duly complied with the laws of the State of South Dakota. That this action was brought by the said plaintiff and respondent as appears by his complaint and the record therein in the Circuit Court of Aurora County, in the State of South Dakota, to recover double damages in the 150 sum of $1,676.40, under the provisions of Chapter 215 of the session laws of South Dakota for the year 1907 requiring railroad corporations to pay double the amount of damages incurred by fires communicated by locomotive engines. It was alleged in substance in plaintiff's complaint that he had sustained actual damages in the sum of $838.20 on account of loss of personal property, goods and effects occasioned by a fire communicated and set by a locomotive engine in use on appellant's railroad, to the grass on land adjoining said line of railway of appellant, near the premises occupied by respondent. That the said fire spread and communicated to the premises occupied by plaintiff, consuming and destroying the said personal property, goods and effects of the value aforesaid.

II.

The petitioner herein duly answered said complaint admitting the incorporation of defendant and denying the other allegations thereof; for second defense alleged: that within sixty days after the service of notice of loss and damage the defendant offered in writing to pay plaintiff Five hundred dollars as the full amount of damage sustained; that the damage sustained was less than Five hundred dollars; for third defense, alleged: corporate existence of defendant, the purchase of right of way for valuable consideration over and across plaintiff's lands for railroad purposes; that the damage complained of was contemplated, considered, determined and fully compensated; for a fourth defense, alleged: That the Chapter 215 of the Session Laws of South Dakota, for the year 1907, requiring railroads to pay double damages in certain cases, conflicts with and violates and infringes the provisions of Section 1, 2 and 18 of Article 6 of the state constitution; and also of Section 1 of Article 14 of the Constitution of the United States, in that the Session Laws of South Dakota for the year 1907 makes an unjust discrimination in granting privileges and immunities to citizens, classes and corporations, which upon the same terms are not granted at all, in
that the said Law of 1907, and particularly Section 2, is an
151 unlawful interference with the liberty and property of the
citizen and corporation, in that it discriminates against the individual citizen or corporation in depriving it of its property, so far as it exceeds the value of the property alleged to have been injured and destroyed, in attempting to recover double damages therefor, all of which is without due process of law, and therein and thereby the defendant is denied the equal protection of the laws, in depriving it of its property,—that it singles out of all citizens and corporations, and requires them to pay, in certain cases, double damages to the party successfully suing them, while it gives them no corresponding benefit; and that such law of 1907 attempts to punish the defendant for no wrong or act of negligence upon its part; demanding judgment of dismissal of the complaint and costs in case recovery is less than $500.

III.

Subsequently, the issues raised by the said pleadings came on for trial in said court on the 19th day of February, 1909, and was tried before the court and jury, resulting in a verdict in favor of the plaintiff and against the defendant, the petitioner, in the sum of $780.00; that thereafter, pursuant to notice, upon motion of the plaintiff the court on the 22nd day of October, 1909, did render judgment thereon in favor of the plaintiff and against defendant, the petitioner in double the amount of said verdict, to-wit, in the sum of $1,632.80, including the interest on the sum $1,560.00 from the date of the verdict, and $82.50 costs.

IV.

That thereafter in due time a bill of exceptions was duly prepared and allowed by the Judge of said court as provided by law, including specification of errors, specifying among other things that the verdict of the jury and judgment rendered by the court is not justified as against law: The action is brought and maintained under Chapter 215 of the Session Laws of 1907, of South Dakota; the said Act violates Sections 1, 2 and 18 of Article 6 of the Constitution of the State of South Dakota, and also Section 21 of Article 3;
152 it also violates the 14th Amendment to the Constitution of the United States; Section 2 of said Act of 1907 has for its object the obtaining of double damages as expressed in its title; that the Act seeks to create an absolute liability, without negligence, and inflicts a penalty additional when the railroad company is doing a lawful act and in no manner violates law; double damages are exemplary and some duty first imposed must be violated; excess of actual damage can only be obtained in the event of negligence, or failure to do some duty by law imposed; the penalty imposed by this Act is not because of negligence, but because the railway company fails to pay a debt or obligation; which rule regulates the payment of debts by railway companies and is different from that prescribed by others—therefore, class legislation; that the defendant herein is entitled to the equal protection of the laws guaranteed it by the State and Federal Constitutions, that it can not be singled out and required to pay, in certain cases, double damages to the parties successfully suing it, while it gives to it no corresponding benefit; thereafter motion for new trial was duly made upon the grounds among others of the unconstitutionality of Chapter 215 of the Session Laws of the State of South Dakota for the year 1907, which said motion was by the court in all things overruled and denied, whereupon the defendant, petitioner duly perfected an appeal, from the whole and every part of said order and judgment, to the Supreme Court of the State of South Dakota, assigning the errors specified in the bill of exceptions and that of denying and overruling the motion for new trial, and duly presented and argued the same and demanded a reversal of said judgment and order denying motion for new trial.

V.

That thereafter upon a full consideration of matters the Supreme Court of the State of South Dakota affirmed the judgment appealed from and the order denying motion for a new trial and entered its judgment thereon on the 2nd day of November, 1910, affirming

the said judgment of the said Circuit Court of Aurora County, in
the State of South Dakota, and holding and adjudging that
153 the said Chapter 215 of the Session Laws of South Dakota
for the year 1907, was not a violation of the Federal Constitution of the United States, and was a valid law in all respects, and in no manner was discriminatory nor did it deny the appellant the equal protection of the law, and was in no manner a violation of the 14th Amendment to the Constitution of the United States. That thereafter in due time the defendant petitioner duly made and filed its application for rehearing in said case in the said Supreme Court of the State of South Dakota, urging that there was a Federal question involved in said action, and that the said Chapter 215 of the Session Laws of South Dakota for the year 1907 was a violation of the provisions of the Constitution of the United States, and fully presented the grounds urged in the original argument of said case involving a Federal question and in the said application for rehearing. All the points relating to a Federal question and specified in paragraph IV of this petition were urged and presented to said Supreme Court of the State of South Dakota. That said application for rehearing was denied on the 19th day of September, 1911, Judge Haney dissenting, so that the said judgment has now become final in the Supreme Court of the State of South Dakota, from which there is no appeal or provision for further review. That in the said holdings and judgments of the said Supreme Court of South Dakota manifest error has happened to the great damage of your petitioner. That, although your petitioner in his answer in the said Circuit Court of Aurora County, South Dakota, as also in his assignment of errors and in his brief filed in the said Supreme Court specially set up and claimed that a Federal question was involved and that the respondent, in law and as a matter of right, should not recover of defendant and appellant double damages and damages in excess of actual damages, for any loss occasioned by a fire as alleged in said complaint of plaintiff, and for other reasons involving a federal question plainly and clearly, yet, the decision of the said Supreme Court of South Dakota, as well as of said Circuit Court of Aurora County, in said State, was against the said right of appellant so as aforesaid specially set forth and alleged and continuously claimed
and the said final judgment of the Supreme Court of South
154 Dakota affirmed the said judgment of said Circuit Court,
finally determining said action in favor of the respondent upon the merits.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota and the Judges thereof, to the end that the record in said action and matter may be removed into the Supreme Court of the United States and the error complained of by your petitioner may be examined and corrected, and the said judgment of the said Supreme Court of the State of South Dakota, be in all things reversed and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the Supreme Court of the United States; and your petitioner will ever pray.

Done this 14th day of October, 1911.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
By WILLIAM G. PORTER,
Its Duly Authorized Agent and Attorney.

WILLIAM G. PORTER,
H. C. PRESTON,
Attorneys for said Petitioner.
BURTON HANSON,
Of Counsel.

The writ of error as prayed for in the foregoing petition is hereby allowed this 28th day of October, 1911, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed in the sum of Three Thousand Dollars ($3,000).

Dated at Pierre, South Dakota this 28th day of October, 1911.

ELLISON G. SMITH,
Presiding Judge of the Supreme Court South Dakota.

155 [Endorsed:]. Original. 2906. In the Supreme Court of the State of South Dakota, October Term, 1911. J. F. Polt, Plaintiff & Respondent vs. Chicago, Milwaukee and St. Paul Railway Company, a Corporation Defendant & Appellant. Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota. Supreme Court, State of South Dakota. Filed Oct. 18, 1911. Frank Crane, Clerk.

156–164 And afterwards, to wit: on the same date, there was filed assignment of errors, which in words and figures is as follows, to wit:

* * * * * * *

165 And afterwards, to wit: on the same date, bond on writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota was filed, which in letters and figures is as follows, to wit:

166 In the Supreme Court of the United States.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY, a Corporation,
Plaintiff in Error,
vs.
J. F. POLT, Defendant in Error.

Bond on Writ of Error from Supreme Court of the United States to Supreme Court of the State of South Dakota.

Know All Men by These Presents: That we, Chicago, Milwaukee and St. Paul Railway Company, a Corporation, as principal, and

Frank B. Gannon and Joseph H. Suttle as sureties, are held and firmly bound unto J. F. Polt, defendant in error, in the sum of Three Thousand Dollars ($3,000) to be paid to the said obligee, his successors, representatives and assigns; for the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of October, 1911.

Whereas, the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of South Dakota.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHICAGO, MILWAUKEE AND SAINT
PAUL RAILWAY COMPANY,
By WILLIAM G. PORTER,
Its Duly Authorized Agent and Attorney.
FRANK B. GANNON.
JOSEPH H. SMITH.

Signed, sealed and delivered in presence of,
ALVIN J. OTT.
D. C. KINSEL.

167 STATE OF SOUTH DAKOTA,
County of Brown, ss:

Be it remembered that on this 27th day of October, 1911, before me Fred H. Gannon, a Notary Public within and for said County and State, personally appeared William G. Porter, known to me to be the duly authorized agent and attorney in fact of the Chicago, Milwaukee and St. Paul Railway Company, a Corporation, that is described in and that executed the within instrument and duly acknowledged to me that such corporation executed the same.

In witness whereof I have hereunto subscribed my name and affixed my official seal at Aberdeen, in said County and State the day and year last above written.

[Seal of Fred H. Gannon, Notary Public, South Dakota.]

FRED H. GANNON,
Notary Public in and for said
County and State.

STATE OF SOUTH DAKOTA,
County of Brown, ss:

Be it remembered that on this 27th day of October, 1911, before me Fred H. Gannon, a Notary Public within and for said County and State, personally appeared Frank B. Gannon and Joseph H.

Suttle, known to me to be the persons who are described in and who executed the foregoing bond, and severally duly acknowledged to me that they executed the same as their free and voluntary act and deed.

In witness whereof I have hereunto subscribed my name and affixed my official seal at Aberdeen in the said County and State the day and year last above written.

[Seal of Fred H. Gannon, Notary Public, South Dakota.]

FRED H. GANNON,
Notary Public in and for said
County and State.

168 STATE OF SOUTH DAKOTA,
County of Brown, ss:

Frank B. Gannon and Joseph H. Suttle, being severally duly sworn, each for himself and not one for the other, upon his oath says: The said Frank B. Gannon for himself says that he is a resident and freeholder within the State of South Dakota and that he is worth the sum of Six Thousand Dollars ($6000) over and above all his debts and liabilities, in property within said State of South Dakota not by law exempt from execution; and the said Joseph H. Suttle for himself says that he is a resident and freeholder within the State of South Dakota and that he is worth the sum of Six Thousand Dollars ($6000) over and above all his debts and liabilities, in property within said State of South Dakota not by law exempt from execution. And the said affiants do further say that they are the sureties named in and who executed the foregoing bond and that they reside at Aberdeen in said County and State.

FRANK B. GANNON,
JOSEPH H. SUTTLE.

Subscribed and sworn to before me this 27th day of October, 1911.

[Seal of Fred H. Gannon, Notary Public, South Dakota.]

FRED H. GANNON,
Notary Public in and for said County and State.

I hereby approve the foregoing bond and sureties this 28th day of October, 1911.

ELLISON G. SMITH,
Presiding Judge of the Supreme Court of
the State of South Dakota.

169 [Endorsed:] Original. (Original.) 2906. In the Supreme Court of the United States. Chicago, Milwaukee and St. Paul Railway Company, Plaintiff in Error vs. J. F. Polt, Defendant in Error. Bond on Writ of Error from the Supreme Court of the United States to Supreme Court of the State of South Dakota. Supreme Court, State of South Dakota. Filed Oct. 28, 1911. Frank Crane, Clerk.

170 And afterwards, to wit: on the same date, order allowing writ of error was filed in the above entitled cause, which in words and figures is as follows, to wit:

171 In the Supreme Court of the State of South Dakota, October Term, 1911.

J. F. POLT, Plaintiff and Respondent,
vs.
CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Defendant and Appellant.

Order Allowing Writ of Error from the Supreme Court of the United States to Supreme Court of South Dakota.

The above entitled matter and cause coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota, and upon examination and filing of said petition and the record in said matter, together with the said petitioner's assignment of errors, and desiring to give the said petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter:

It is ordered, That a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby, approved.

Done at Pierre, in the State of South Dakota, this 28th day of October, A. D. 1911.

[Seal Supreme Court, State of South Dakota.]

ELLISON G. SMITH,
Presiding Judge of the Supreme Court of the State of South Dakota.

Attest:
FRANK CRANE, *Clerk.*

172 [Endorsed:] Original. 2,906. In the Supreme Court of the State of South Dakota, October Term, 1911. J. F. Polt, Plaintiff and Respondent, vs. Chicago, Milwaukee and St. Paul Railway Company, a Corporation, Defendant and Appellant. Order Allowing Writ of Error from the Supreme Court of the United States to Supreme Court of South Dakota. Supreme Court, State of South Dakota. Filed Oct. 28 1911. Frank Crane, Clerk.

173 And afterwards, to wit: on the same date, citation was filed in the above entitled cause, which in words and figures is as follows, to wit:

174 UNITED STATES OF AMERICA, *ss:*

To J. F. Polt, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of South Dakota, wherein the Chicago, Milwaukee and St. Paul Railway Company is plaintiff in error and you are defendant in error, to show cause. if any there be, why the judgment rendered against the said Plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 28th day of October, in the year of our Lord, One Thousand Nine Hundred and Eleven.

ELLISON G. SMITH,
Presiding Judge of the Supreme Court of the State of South Dakota.

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that I served the within Citation on the therein named J. F. Polt at 8 miles south-east of Plankinton, S. D., on the 4th day of November 1911 by handing to and leaving with him a certified copy thereof.

I further certify that I served the within Citation on Fellows and Fellows, attorneys for J. F. Polt, at Plankinton, S. D., on the 4th day of November 1911 by handing to and leaving with Donald Fellows, one of the firm of Fellows and Fellows, a certified copy thereof.

SETH BULLOCK,
United States Marshal, South Dakota;
By W. O. McQUEEN,
Deputy U. S. Marshal.

Fees....	$4.00
Expense..	3.96
Total..	$7.96

175 [Endorsed:] Original. 2906. (Original.) In Supreme Court of United States. Chicago, Milwaukee and St. Paul Railway Company, Plaintiff in error, vs. J. F. Polt, Defendant in Error. Citation. Dist. of South Dakota. Received Nov. 2, 1911. Office of United States Marshal. Supreme Court, State of South Dakota. Filed Oct. 28, 1911. Frank Crane, Clerk.

176 And afterwards, to wit; on the same date, there was filed in the above entitled cause writ of error, which in words and figures is as follows, to wit:

177 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of South Dakota, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between J. F. Polt, respondent, and the Chicago, Milwaukee and St. Paul Railway Company, a Corporation, appellant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said appellant as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid
being inspected, the said Supreme Court may cause further
178 to be done therein to correct that error, what of right, and
according to the laws and customs of the United States,
should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 30th day of October, in the year of our Lord, One Thousand Nine Hundred and Eleven.

OLIVER S. PENDAR,
Clerk of the Circuit Court of the United
States for the District of South Dakota.

[Seal Circuit Court of the United States, District of South Dakota. Sioux Falls.]

Allowed by:

CHAS. S. WHITING,
Acting Presiding Judge of the Supreme Court
of the State of South Dakota.

[Seal Supreme Court, State of South Dakota. Justice.]

Attest:
FRANK CRANE, *Clerk.*

UNITED STATES OF AMERICA,
District of South Dakota, ss:

I hereby certify and return that I served the within Writ of Error on the therein named J. F. Polt, respondent, at 8 miles south east of Plankinton, S. D., on the 4th day of November 1911 by handing to and leaving with him a certified copy thereof.

I further certify and return that I served the within Writ of Error on Fellows and Fellows, attorneys for the respondent, at Plankinton, S. D., on the 4th day of November 1911 by handing to and leaving with Donald Fellows, one of the firm of Fellows and Fellows, a certified copy thereof.

SETH BULLOCK,
United States Marshal, South Dakota;
By W. O. McQUEEN,
Deputy U. S. Marshal.

Fees $4.00.

179 [Endorsed:] (Original.) In Supreme Court of the United States. Chicago, Milwaukee and St. Paul Railway Company, Plaintiff in Error, vs. J. F. Polt, Defendant in Error. Writ of Error. Dist. of South Dakota. Received Nov. 2. 1911. Office of United States Marshal. Supreme Court, State of South Dakota. Filed Oct. 28, 1911. Frank Crane, Clerk.

180 And I hereby certify that the within and foregoing papers are all true copies and originals of the papers in the above entitled cause and a true record of the proceedings in this Court.

[Seal Supreme Court, State of South Dakota. Justice.]

FRANK CRANE,
Clerk of Supreme Court, S. Dak.

181 In the Supreme Court of the United States, October Term, 1911.

No. 927.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
J. F. POLT, Defendant in Error.

Statement of the Errors on Which Plaintiff in Error Intends to Rely.

And now comes the Chicago, Milwaukee & St. Paul Railway Company, plaintiff in error, by its counsel in the above stated case, and files this statement of the errors on which it intends to rely, and says that in the record and proceedings in the aforesaid cause there is manifest error in this, to-wit:

First. That the said Supreme Court of the State of South Dakota erred in determining the said cause and in rendering and entering judgment therein affirming the judgment of the Circuit Court of Aurora County, in the State of South Dakota, wherein a verdict was rendered for the defendant in error and against the plaintiff in error, in the sum of $780.00, and a judgment rendered and entered upon the said verdict in double the amount thereof, to-wit, in the sum of $1560.00, together with interest thereon from February 19th, 1907, at the rate of 7 per cent per annum, aggregating the sum of $1632.80, together with the sum of $82.55 costs and disbursements, and in holding and adjudging that defendant in error was entitled to recover and have judgment rendered for a sum double the amount of the verdict, and in a sum double the actual damages and damages as fixed and assessed by the jury upon the trial; and in adjudging and holding that the same was not in violation of and repugnant to the 14th Amendment to the Constitution of the United States; and that the same was not a denial to the plaintiff in error thereunder of the equal protection of the law; and that the 182 same was not taking plaintiff in error's property without just compensation; and that the enforcement of the said law under which said action was brought, to-wit; Chapter 215 of the Session Laws of South Dakota for the year 1907, was not a violation of the protection guaranteed to plaintiff in error by the 14th Amendment to the Constitution of the United States; and that the same was not depriving plaintiff in error of its property without due process of law; and the said judgment of the said Supreme Court is predicated upon said decision.

Second. That the said Supreme Court of the State of South Dakota, in determining said cause and rendering the said judgment affirming the judgment of said Circuit Court of Aurora County, South Dakota, erred in this: that although plaintiff in error in its answer in the Said Circuit Court of Aurora County averred, asserted and claimed; "That the provisions of Chapter 215 of the Session Laws of this state for the year 1907, at page 448 thereof, Requiring Railroad Companies To Pay Double Damages In Certain Cases, conflicts with and violates and fringes * * * the provisions of Section 1, of Article 14 of the Constitution of the United States, in that the said Law of 1907 makes an unjust discrimination in granting privileges and immunities to citizens, classes and corporations, which upon the same terms are not granted to all, in that the said Law of 1907, and particularly Section 2, is an unlawful interference with the liberty and property of the citizen and corporation; in that it discriminates against the individual citizen or corporation in depriving it of its property, so far as it exceeds the value of the property alleged to have been injured and destroyed, in attempting to recover double damages therefor, all of which is without due process of law, and therein and thereby, the plaintiff in error is denied the equal protection of the laws, in depriving it of its property,—that it singles out of all citizens corporations, and requires them to pay in certain cases double damages to the party successfully suing them, while it gives them no corresponding benefit. And that such Law of 183 1907 attempts to punish this defendant for no wrong or act of negligence upon its part," and although upon the trial of said cause, and further, in its assignment of errors, and in its brief filed in said case in said Supreme Court, and from the outset of the proceedings in said case, and throughout the same, and at each proper step and covering the entire case, it was contended by plaintiff in error, and distinctly and specially set up and asserted and claimed by it that a federal right and question or immunity existed and was involved in said cause and litigation and subject to protection by and under the Constitution of the United States. Yet, the said decision of said Supreme Court of South Dakota, as well as of the said Circuit Court of Aurora County, was against the contention of the plaintiff in error and against the said federal right and question or immunity so specially set up, asserted and claimed, and the said final judgment of said Supreme Court of South Dakota is based upon said decision.

Third. That the Supreme Court of South Dakota, in rendering and entering said final judgment affirming the judgment of the Circuit Court of said Aurora County, erred in this, to-wit; that although, under the pleadings and issues in said case, and upon the trial thereof in the said Circuit Court of Aurora County, and in the Supreme Court of South Dakota, it was explicitly and continuously claimed by plaintiff in error, and specifically and specially set up and asserted and claimed in its brief and argument, and in all proceedings in the said case in said Supreme Court of the State of South Dakota, and in the application for rehearing in said Supreme Court, that the law under which defendant in error seeks to recover double damages and damages double the amount actually sustained, to-wit; Chapter 215 of the Session Laws of the State of South Dakota for the year 1907, is null and void and unconstitutional, and specifying as grounds and reasons therefor, the following:

1. That the said law is repugnant to the 14th Amendment to the Constitution of the United States, and that defendant in error seeks thereunder to deprive plaintiff in error of its property without due process of law.

184 2. That the said law, and the provisions thereof, are repugnant to the 14th Amendment to the Constitution of the United States, and that thereunder the plaintiff in error is denied the equal protection of the law.

3. That the enforcement thereof will amount to the taking of plaintiff in error's property without just compensation and is in violation of the protection guaranteed to the plaintiff in error by the 14th Amendment to the Constitution of the United States.

4. The said law singles out corporations and requires them to pay in certain instances and cases, double damages to the party successfully suing them, while it gives no corresponding benefit, and that such a law seeks to punish this plaintiff in error for no wrong on account of negligence upon its part. Yet, the Supreme Court of the State of South Dakota held and decided against all the contentions and objections, duly and timely made, of the said plaintiff in error, and the said final judgment is based upon said decision.

Fourth. That the said Supreme Court of the State of South Dakota in determining said cause and in rendering judgment affirm-

ing the said judgment of the said Circuit Court of Aurora County, South Dakota, and in denying on the 19th day of September, 1911, plaintiff in error's application for rehearing in said case, erred in this, to-wit; that this action, as fully appears by the pleadings therein and by the record, was brought in Aurora County, South Dakota under Chapter 215 of the Session Laws of the State of South Dakota for the year 1907 to recover double damages on account of the setting out of a fire and destroying certain personal property of defendant in error. That, although, throughout said trial in the said Circuit Court of Aurora County, and in the presentation of the case before the Supreme Court of the State of South Dakota, and in all the proceedings from the outset to the determination of the said case in the Supreme Court of the State of South Dakota, and particularly in the application for rehearing of the said cause, plaintiff in error raised a federal question and right and urged upon the said
185 Supreme Court the unconstitutionality of the said law and wherein it was in violation of the 14th Amendment to the Constitution of the United States, and at length and in particular in said application for rehearing, which was fully presented before the Court, yet said Court denied on the 19th day of September, 1911 the said federal question and right and that the said law of South Dakota was, and is, palpably in violation of the Constitution of the United States and the Supreme law of the land. Yet, notwithstanding the presentation of said matters and a full consideration of the same by the said Supreme Court of the State of South Dakota, the said Supreme Court of the State of South Dakota decided against the said contentions of said plaintiff in error and the said judgment of said Supreme Court was, and is, predicted upon said decision. That the main and important and controlling question which was presented to the said Supreme Court of the State of South Dakota for determination upon the said appeal in said case, was the unconstitutionality of the said Chapter 215 of the Session Laws of the State of South Dakota for the year 1907, and that if the said Supreme Court, did not, in express terms, pass upon the federal right or immunity specially set up of record in said cause, yet, the necessary effect of the said final judgment of the said Supreme Court of the State of South Dakota is to deny a federal right or immunity specially set up and claimed and which if recognized and enforced, would require a judgment different from one resting upon the ground of local or general law.

Fifth. The said Supreme Court of the State of South Dakota in determining said cause and in rendering and entering said judgment affirming the said judgment of the said Circuit Court of Aurora County, erred in this, to-wit; the said Circuit Court of Aurora County erred in overruling the plaintiff in error's objection at the commencement of the trial in which it objected to the receipt of any testimony in the case for the reason that the complaint does not state facts sufficient to constitute a cause of action; erred in denying
186 plaintiff in error's motion at the close of defendant in error's case in said Circuit Court, to direct the jury to return a verdict for the plaintiff in error for the reason stated in said motion; erred in not sustaining plaintiff in error's motion to direct the jury to return

a verdict in favor of the plaintiff in error for the reasons therein stated, which said motion was made before and after defendant in error and plaintiff in error had rested their case; erred in rendering a judgment therein over plaintiff in error's objections for the reasons assigned in the plaintiff's motion to diect the jury to return a verdict in favor of the plaintiff in error at the close of the testimony in the case when each party rested; erred in sustaining defendant's motion for judgment over the objections of plaintiff in error and in rendering a judgment in the sum of $1715.35, the same being double the amount of the verdict and the actual damages claimed to have been sustained by the defendant in error, together with interest and costs from the date of the verdict; erred in denying the motion of plaintiff in error for a new trial, and in making an order overruling the motion of plaintiff in error for a new trial and erred in making and entering said order denying a new trial and making and entering a judgment in said case. And the Supreme Court of the State of South Dakota erred in affirming and approving said decisions and rulings and judgment of the said Circuit Court of Aurora County, South Dakota, for the reasons therein assigned, and for the reasons hereinbefore specified and assigned.

Sixth. For all the reasons hereinbefore specified and assigned, said verdict of the said jury, and the said judgment of the said Circuit Court, and the said judgment of the Supreme Court of the State of South Dakota are erroneous and contrary to law and contrary to the 14th Amendment to the Constitution of the United States and in violation of the federal rights guaranteed by the Constitution of the United States to plaintiff in error, and each should be vacated and set aside and the said Supreme Court of the State
of South Dakota should have reversed the said judgment of
187 the said Circuit Court and the said order overruling and
denying plaintiff's motion for new trial.

Wherefore, the said plaintiff in error prays that the said judgment and the decision of the Supreme Court of the State of South Dakota may be reversed, set aside and annulled, and that the said plaintiff in error may be restored to all things which it hath lost by the action and because of said judgment and decision.

BURTON HANSON,
WILLIAM G. PORTER,
HARRISON C. PRESTON,
Attorneys for Plaintiff in Error.

188 [Endorsed:] Duplicate Original. No. 927, 23003. In the Supreme Court of the United States, October, 1911, Term. C. M. & St. P. Ry. Co., Plaintiff in Error, vs. J. F. Polt, Defendant in Error. Statement of the Errors on which Plaintiff in Error intends to Rely. Service of the within by copy is hereby admitted at Plankinton, S. D., this 12th day of March, 1912. Fellows & Fellows, Attorneys for J. F. Polt. Service of the within by copy is duly admitted this 12th day of March 1912. Due, legal and personal service of the within and foregoing statement of errors is hereby acknowledged by delivery to us of a true and correct copy of the same at Plankinton, S. D., this 12th day of March 1912. Fellows & Fellows, Att'ys for Defendant in error.

189 In the Supreme Court of the United States, October Term, 1911.

No. 927.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
J. F. POLT, Defendant in Error.

Statement of the Parts of the Record Which the Plaintiff in Error Thinks Necessary for the Consideration of the Errors on Which it Intends to Rely.

And now comes the Chicago, Milwaukee & St. Paul Railway Company, Plaintiff in Error, by its counsel in the above stated case, and files and serves this statement of the parts of the record which the said Plaintiff in Error thinks necessary for the consideration of the errors on which it intends to rely, and said Plaintiff in Error hereby requests the Clerk of the said Court to cause to be printed the following parts of the record, to-wit:

Writ or error, with proof of service thereof; citation in error, with proof of service thereof; petition for writ of error; assignment of errors; bond on writ or error; order allowing writ of error; clerk's certificate and return to writ of error; the printed abstract filed by the said plaintiff in error as appellant in the Supreme Court of the State of South Dakota on its appeal to that Court from the judgment and order of the Circuit Court of Aurora County in said State, and containing 44 pages, exclusive of the index thereto; the printed brief filed by the said plaintiff in error as appellant in the Supreme Court of the State of South Dakota on said appeal; opinion of the Supreme Court of the State of South Dakota, filed on said appeal on
November 2nd, 1910; judgment of the Supreme Court of
190 the State of South Dakota, filed and entered on said appeal
November 2nd, 1910; petition for rehearing filed by plaintiff in error on November 30th, 1910; order denying said application for rehearing, made and filed September 19th, 1911, together with the indorsements and filings upon the said several records and papers.

Annexed hereto is a statement of the errors on which said plaintiff in error intends to rely.

Dated at Aberdeen, South Dakota, this 5th day of March, A. D., 1912.

BURTON HANSON,
WILLIAM G. PORTER,
HARRISON C. PRESTON,
Attorneys for said Plaintiff in Error.

191 [Endorsed:] Duplicate Original. No. 927. In the Supreme Court of the United States, October, 1911, Term. C. M. & St. P. Ry. Co., Plaintiff in Error vs. J. F. Polt, Defendant

in Error. Statement of the Parts of the Record which the Plaintiff in Error Thinks Necessary for the Consideration of the Errors on Which it Intends to Rely. Due, legal and personal service of the within and foregoing statement of parts of record to be printed is hereby acknowledged by delivery to us of a true and correct copy of the same at Plankinton, S. D., this 12th day of March, 1912. Fellows & Fellows, Att'ys for Defendant in error.

192 In the Supreme Court of the United States, October Term, 1911.

No. 927.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, a Corporation, Plaintiff in Error,
vs.
J. F. POLT, Defendant in Error.

Affidavit of Personal Service of Annexed Statements.

UNITED STATES OF AMERICA,
State of South Dakota, County of Davison, ss:

Charles F. Tym being first duly sworn upon his oath, says: That he is a male citizen of the United States over the age of twenty-one years, and a qualified elector of the County of Davison, State of South Dakota, and is not a party to or interested in the above entitled case. That on the 12th day of March, 1912, at Plankinton, in the County of Aurora and State of South Dakota, at the hour of eight o'clock P. M., affiant personally served the annexed statement of errors on which said plaintiff in error intends to rely, and of the parts of the record which it thinks necessary for the consideration thereof, upon Donald Fellows, Esq., a member of the law firm of Fellows & Fellows, an attorney of record for the above named defendant in error, by then and there delivering to and leaving with the said Donald Fellows personally a true copy of the said statements.

CHARLES F. TYM.

Subscribed and sworn to before me this 13th day of March, A. D. 1912.

[Seal of Marie Montgomery, Notary Public, South Dakota.]

MARIE MONTGOMERY,
Notary Public in and for
Davison County, South Dakota.

193 In the Supreme Court of the United States, October Term, 1911.

No. 927.

Chicago Milwaukee and St. Paul Railway Company, a Corporation, Plaintiff in Error,

vs.

J. F. Polt, Defendant in Error.

Affidavit of Personal Service of Annexed Statements.

United States of America,
State of South Dakota, County of Davison, ss:

Charles F. Tym being first duly sworn upon his oath, says: That he is a male citizen of the United States over the age of twenty-one years, and a qualified elector of the County of Davison, State of South Dakota, and is not a party to or interested in the above entitled case. That on the 12th day of March, 1912, at Plankinton, in the County of Aurora and State of South Dakota, at the hour of seven o'clock P. M., affiant personally served the annexed statement of errors on which said plaintiff in error intends to rely, and of the parts of the record which it thinks necessary for the consideration thereof, upon the above named defendant in error, by then and there delivering to and leaving with the said J. F. Polt, defendant in error personally a true copy of the said statements.

CHARLES F. TYM.

Subscribed and sworn to before me this 13th day of March, A. D. 1912.

[Seal Marie Montgomery, Notary Public, South Dakota.]

MARIE MONTGOMERY,
Notary Public in and for
Davison County, South Dakota.

194 [Endorsed:] File No. 23,003. Supreme Court U. S. October Term, 1911. Term No. 927. The Chicago, Milwaukee — St. Paul Ry. Co., Pl'ff in Error, vs. J. F. Polt. Statement of errors relied on and designation by plaintiff in error of parts of record to be printed, with proofs of service of same. Filed March 18, 1912.

Endorsed on cover: File No. 23,003. South Dakota Supreme Court. Term No. 512. The Chicago, Milwaukee and St. Paul Railway Company, plaintiff in error, vs. J. F. Polt. Filed January 9th, 1912. File No. 23,003.

Supreme Court of the United States

OCTOBER TERM, 1913, No. 161

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR

vs.

J. F. POLT

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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Supreme Court of the United States

OCTOBER TERM, 1913, No. 161

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, PLAINTIFF IN ERROR

vs.

J. F. POLT

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

I

STATEMENT OF THE CASE

This is a writ of error to the Supreme Court of the state of South Dakota to review a judgment of that court affirming a judgment of the Circuit Court in and for Aurora county, state of South Dakota, which was rendered in favor of defendant in error for double the amount of damages assessed by the jury under Chapter 215 of the Session Laws of the state of South Dakota for the year 1907.

It is alleged in the complaint of defendant in error that on the 21st day of March, 1908, a fire was set by a locomotive in use on the railroad of the plaintiff in error, to premises adjoining and from thence was communicated to the premises of the defendant in error and destroyed certain property of the value of $838.20; that on May 26th, 1908, the defendant in error gave notice in writing, accompanied by his affidavit, that such loss had occurred to him, a copy of which notice was annexed to and made a part of said complaint; that more than 60 days had elapsed since the service of the notice, and plaintiff in error failed and neglected to compensate the loss, and demanded judgment for $1,676.40, with interest and costs. (Record pp. 3-6.)

The plaintiff in error answered, denying generally the allegations of the complaint, and alleging that plaintiff in error offered in writing to pay plaintiff the sum of $500.00 within 60 days after the service of the notice of loss, which offer was by the defendant in error refused; that the damage did not exceed the sum of $500.00. and further alleging that the provisions of said Chapter 215 of the Session Laws of South Dakota conflicts with, violates and infringes upon the provisions of Section 1 of Article 14 of the Constitution of the United States, making unjust discrimination in granting privileges and immunities to citizens, classes and corporations, which upon the same terms are not granted to all, and particularly that Section 2 of said act is an unlawful interference with the liberty and property of the citizen and corporation in that it discriminates against an individual citizen or corporation in depriving it of its property so far as it exceeds the value of the property alleged to have been destroyed, in providing double damages therefor, all of which is without due process of law, and therein and thereby the defendant is denied the equal protection of the laws in depriving it of its property; that it is singled out of all citizens and corporations and required to pay in certain cases double damages to the party successfully suing it, while it is given no corresponding benefit; and that such act attempts to provide a penalty in the absence of any wrongful and negligent act. (Record. pp. 6-8.)

Upon the trial it was admitted that notice of loss in writing, accompanied by affidavit, was served upon plaintiff in error, and that within 60 days an offer to pay $500.00 in satisfaction of the claim of defendant in error was made, and that such offer was rejected. (Record p. 14.)

The jury returned a verdict for the defendant in error, assessing his damage in the sum of $780.00. (Record p. 16.)

Thereafter, upon motion of defendant in error, the court entered judgment upon said verdict for double the amount of damages assessed by the jury, with interest and costs, aggregating the sum of $1,715.35. (Record pp. 17-18.)

That thereafter due and timely notice of intention to move for new trial was given by plaintiff in error upon statutory grounds, including the error of the court in rendering a judgment for double the amount of damage assessed by the jury. (Record pp. 20-21.)

Thereafter the plaintiff in error presented its motion for new trial upon a bill of exceptions and specifications of error, which motion was by the court overruled, and plaintiff in error perfected its appeal to the Supreme Court of the state of South Dakota from said judgment and order denying motion for new trial, assigning and arguing the errors assigned and presented in this court. (Record pp. 18-29, 33-47.)

That thereafter and on November 2d, 1910, an opinion and judgment was handed down by the Supreme Court of the state of South Dakota, affirming in all things the judgment and order appealed from. (Record pp. 27-29.)

That on November 16th, 1910, a petition for rehearing was duly filed in the Supreme Court of the state of South Dakota. (Record pp. 29-32.)

Thereafter, to-wit, on the 19th day of September, 1911, said petition for rehearing was denied by the Supreme Court of the state of South Dakota. (Record p. 33.)

Thereafter and on the 28th day of October, 1911, the plaintiff in error duly presented to the Supreme Court of the state of South Dakota its petition for writ of error to the Supreme Court of the state of South Dakota, alleging among other things that in the said holdings and judgment of the Supreme Court of South Dakota, manifest error has happened to the petitioner, plaintiff in error. That, although plaintiff in error in its answer in the said Circuit Court of Aurora county, South Dakota, as also in its assignment of errors and in its brief filed in the said Supreme Court, specially set up and claimed that a federal question was involved and that the defendant in error, in law and as a matter of right, should not recover of plaintiff in error double damages and damages in excess of actual damages, for any loss occasioned by a fire as alleged in said complaint of defendant in error, and for other reasons involving a federal question plainly and clearly, yet the decision of the said Supreme Court of South Dakota, as well as of said Circuit Court of Aurora county, in said state, was against the said right of plaintiff in error so as aforesaid specially set forth and alleged and continuously claimed, and the said final judgment of the Supreme Court of South Dakota affirmed the said judgment of said Circuit Court, finally determining said action in favor of the defendant in error upon the merits. (Record pp. 33-37.)

And writ of error thereon was by the Supreme Court duly allowed. (Record pp. 37-41.)

And the plaintiff in error duly furnished and filed its bond on writ of error, which was duly approved. (Record pp. 37-40.)

And thereafter citation was duly issued to the defendant in error and personally served upon the defendant in error. (Record p. 41.)

Writ of error to the Supreme Court of South Dakota was duly issued and served. (Record pp. 42-43.)

Plaintiff in error thereafter duly made, served and filed its statement of errors upon which plaintiff relies for a reversal of the judgment and order appealed from, asserting that Chapter 215 of the Session Laws of South Dakota for the year 1907 is unconstitutional and void to the extent that it authorizes the recovery of double the amount of the actual damage sustained, particularly as follows:

1. That the said law is repugnant to the 14th Amendment to the Constitution of the United States, and that defendant in error seeks thereunder to deprive plaintiff in error of its property without due process of law.

2. That the said law, and the provisions thereof, are repugnant to the 14th Amendment to the Constitution of the United States, and that thereunder the plaintiff in error is denied the equal protection of the law.

3. That the enforcement thereof will amount to the taking of plaintiff in error's property without just compensation and is in violation of the protection guaranteed to the plaintiff in error by the 14th Amendment to the Constitution of the United States.

4. The said law singles out corporations and requires them to pay in certain instances and cases, double damages to the party successfully suing them, while it gives no corresponding benefit, and that such a law seeks to punish this plaintiff in error where no wrong or negligence is charged upon its part. Yet, the Supreme Court of the state of South Dakota held and decided against all the contentions and objections, duly and timely made, of the said plaintiff in error, and the said final judgment is based upon said decision. (Record pp. 43-47.)

CHAPTER 215, SESSION LAWS OF SOUTH DAKOTA FOR THE YEAR 1907

The statute of South Dakota requiring railroad companies to pay double damages in certain cases.

AN ACT Requiring Railroad Corporations to Pay Double the Amount of Damages Incurred from Loss of Property, Injured or Destroyed by Fires Communicated by Locomotive Engines, or from the Burning of Grass, Weeds or Rubbish on Right of Way by Employes of such Corporations, in Certain Cases.

Be it Enacted by the Legislature of the State of South Dakota:

Sec. 1. Duty of Railroad Companies] Each railroad corporation owning or operating a railroad in this state, shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, or by the burning of grass, weeds or rubbish on right of way by employes of such corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages.

Sec. 2. Settlement Within Sixty Days] Whenever the property owned by any person or corporation shall be injured or destroyed by fire communicated by locomotives in use upon any railroad owned or operated by a railroad corporation, or by the burning of grass, weeds and rubbish on the right of way by employes of such corporation, so as to render the railroad corporation liable, under Section 1 of this act, or otherwise, the owner of such property injured or destroyed may recover damages for such loss, and to recover the same it shall only be necessary for him to prove the loss of or injury to his property. If such corporation fails or neglects to pay such damage within sixty days after notice in writing that a loss or injury has occurred, accompanied by an affidavit thereof, served upon any officer or station or ticket agent employed by such corporation in the county where such loss or injury occurred, such owner shall be entitled to recover from the corporation double the amount of damages actually sustained by him in any court of competent jurisdiction. If such company shall, within sixty days, offer in writing to pay a fixed sum, being the full amount of the damages sustained, and the owner shall refuse to accept the same, then in any action thereafter brought for such damages when such owner recovers a less sum as damages than the amount so offered, then such owner shall recover only his damages, and the railway company shall recover its costs.

Approved February 25, 1907.

BRIEF OF ARGUMENT

It may be regarded as settled that the legislature, by virtue of its police powers under the constitution, has the right, for the proper protection of individuals and their property, to prescribe certain special duties for such as are engaged in a peculiarly and distinctly hazardous business or employment, and that the legislature may, in order to adequately enforce the performance and observance of such duties, impose a certain penalty for failure, either negligently or willfully, to obey and comply with the same.

The act does not impose a penalty for the violation of any duty, or for negligence, or for loss caused by fire regardless of negligence; the penalty is for delinquency in the payment of certain obligations and is imposed on railroad corporations alone for the right to a trial. The object of the statute involved in this action is to impose a penalty for failure to pay a debt within a certain time. The Supreme Court of South Dakota so construed it, and that court having given the statute such construction, this court will adopt it as the proper construction, following the decisions of this court in that respect. This arbitrary imposition of a penalty is tantamount to the taking of the railroad corporation's property without due process of law. The said law and the provisions thereof, deny to the plaintiff in error the equal protection of the laws, which is repugnant to the fourteenth amendment to the Constitution of the United States.

I

Law unconstitutional—It imposes a penalty for delinquency in payment of debt.

It imposes a penalty for delinquency in payment of debt.

Section 2 of Chapter 215 of the Session Laws of South Dakota for the year 1907 is unconstitutional in that it imposes a penalty for delinquency in the payment of a debt and for the privilege of a trial, railroad companies alone being singled out as a certain class of debtors and subjected to oppressive discrimination, and being arbitrarily classified to suffer the penalty. Section 1 of the act in question is merely declaratory of the common law, and in so far as it declares a liability for the actual damages sustained it is purely remedial in its nature and not penal.

U. P. Ry. Co. v. DeBusk, 12 Col. 294;
Wadsworth v. U. P. Ry. Co., 19 Colo. 600.

If such a statute were made penal regardless of a violation of any duty, it would be unconstitutional.

County of San Mateo v. So. Pac. R. Co. (Cal.), 13 Fed. 722-782 and note. Cited also as the "Railroad Tax Cases," opinion by Field, Justice, Sawyer, C. J., specially concurring.

It may be observed that a comparison of stock killing and fire cases strikingly exemplifies the distinction in the law where the act is penal and where it is purely remedial. Statutes attempting to impose an absolute liability regardless and irrespective of a violation of any duty for killing stock being penal, have invariably been held unconstitutional.

Hurtanto v. California, 110 U. S. 535-537;
St. L. I. M. & S. Ry. Co. v. Wynne (Ark.), 224 U. S. 258;
Stupeck v. Union Pac. Ry. Co., 200 Fed. 192;
Seaboard Air Line v. Seegers, 207 U. S. 73;
A. T. & S. F. Ry. v. Matthews (Kan.), 174 U. S. 96;
Black v. M. & St. L. Ry Co., 122 Ia. 32;
Gulf, Col. & S. F. Ry. Co. v. Ellis, 165 U. S. 150;
Jolliffe v. Brown, 14 Wash. 155;
G. I. & W. C. Ry. v. Swinbank, 51 Neb. 521;
Denver & R. G. v. Outcalt, 2 Colo. App. 394.

The validity of a statutory provision for attorney's fee in the nature of a penalty was first presented and this court was first called upon to consider the question in Gulf, Colo. & Sante Fe Ry. Co. v. Ellis, supra, which action was brought for the killing of a colt by a railroad, and in which it was held that the statute of Texas, which allowed an attorney's fee of $10.00 to successful plaintiff, in an action upon certain classes of claims against railroad companies not exceeding $50.00 in amount, which the company should omit to pay within a certain time after presentation, was invalid. This decision reversed 87 Tex. 18, which had previously upheld such statute. This was held to be simply a statute imposing a penalty for the failure to pay certain debts; that the act singles out certain classes of debtors and punishes them, when for like delinquencies it punishes no others; that they are not treated as other debtors or equally with other debtors.

In A. T. & S. F. R. Co. v. Matthews, supra, the court sustaining the statute of Kansas, imposing double damages on account of loss by fire, recognizes a classification which has for its object some legitimate purpose; but holds invalid any arbitrary selection, although attempted to be justified as a classification, adhering to the doctrine announced in the case of Ry. Co. v. Ellis, supra.

In the Matthews case, supra, and in the case of the Missouri Pacific R. R. Co. v. Merrill, 40 Kan. 404, and kindred cases, the statutes allowing the plaintiff in case of recovery a reasonable attorney's fee, were upheld. It will be noticed, however, that the acts construed in those cases did not, like Section 1 of the act in question and under consideration, impose an absolute liability regardless of a violation of a duty. In those acts the gist of the action was negligence; under this act liability is absolute. While a penalty might be imposed where there is negligence, it cannot be imposed regardless of negligence; for in the one case the penalty is justifiable, whereas in the other it is arbitrary. In the construction of this class of statutes the question is whether or not the statute is penal or remedial. If it be penal, the penalty must be for the violation of some duty. There can be no punishment where there is no offense. It cannot escape one's notice that the statute involved in the *Matthews* case, supra, did not create an absolute liability, and it was held by the court in that case that the purpose of the statute was not to compel the payment of debts, but to secure the utmost and highest care on the part of railroad companies to provide against and to prevent the escape of fire from their moving locomotives and trains. If the purpose of that statute had been to impose a penalty upon the railroad company for not paying damages claimed, doubtless a different conclusion would have been reached in that case. Contrasting the statute of South Dakota in question with that of Kansas, one cannot fail to observe that the former endeavors to impose penalties that are onerous and even outrageous and is so arbitrary that it cannot be treated and regarded as entitled to the same construction as put upon the Kansas statute. In the *Matthews* case an opportunity was given to make proof as to whether the fire was set out through the negligence of the company, or not, and in that case the penalty sought to be imposed was only after the company had been found guilty of negligence. In the instant case the statute in question imposes penalties where fires are set out without regard to negligence on the part of the railway company, or its employes. Therefore, we say an undue and unfair and unjust punishment is sought to be visited upon the railway company under the South Dakota statute, where it has admittedly committed no wrong and violated no duty.

In Jolliffe v. Brown, supra, the court held that a broad distinction is recognized between legislation requiring payment of actual damage and that imposing a penalty in addition thereto, and that the penalty can be imposed only upon a party in fault or guilty of a wrong.

In Denver & R. G. R. Co. v. Outcalt, supra, the court held that the measure of damage for injury to live stock is such amount as will adequately compensate for the loss sustained, and interest thereon to the date of payment, and that double damages for failure to pay within thirty days a penalty and when not imposed for violation of law, criminal intention or moral obliquity, is repugnant to the constitution and, therefore, void.

The difference between the fire and the stock killing cases is only this: In the stock killing cases, no absolute liability can be imposed, regardless of a violation of any duty, because such statute would be penal; in the fire cases, an absolute liability may be imposed for actual damages sustained, because such statute is merely declaratory of the ancient common law, and is purely remedial, on the principle that when one of two equally innocent persons must suffer, the loss should be borne by him who moved the cause. When, in a fire case, in addition to an absolute liability for the actual damages sustained, an absolute penalty is imposed, regardless of a violation of any duty, such statute becomes penal, and, like the stock killing cases, is unconstitutional.

It is believed that no case can be found where a penalty was imposed beyond the actual damages sustained, regardless of a violation of any duty. But whatever distinction there may be between the fire and stock killing cases, that distinction is not material in this case, for the act in question does not impose the penalty for damages sustained by fire, but for the failure to pay certain debts in certain cases within a specified period.

In the acts construed in the Matthews and kindred cases, the attorney fee was made part of the damages sustained from the fire. There it was a charge, not for failure to pay the debt within a specified period, but for permitting fire in the operation of the railroad to cause damage. In those acts the statement was not, "Pay this debt, at your peril, within sixty days after notice, for if you fail so to do, whether you honestly question the justice of the debt or not, you will pay twice the amount, should you not succeed in establishing your defense and every part thereof." There the statement is, "Use due care in your use of a hazardous element, for if you are negligent and the plaintiff establishes your negligence, you will pay, in addition to the actual damages sustained, a reasonable attorney's fee," or such other penalty as may be prescribed.

While the court in the case of Seaboard Air Line v. Seegers, supra, held valid a statute imposing a penalty; yet that is readily distinguishable from other cases holding such a statute invalid and unconstitutional. That case was one where the statute provided for the imposition of a penalty upon the common carrier of $50.00 for failure to adjust and pay the claim. It was also further provided in the statute under consideration in that case that unless the claimant should recover in the action the *full amount claimed*, no penalty should be recovered, and the only amount that could be recovered would be the *actual amount* of *damages*, or loss, with interest. The decision took into account the peculiar phraseology of the statute under consideration. The court expressly said that the purpose of the statute under consideration in that case "is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions. We know there are limits beyond which penalties may not go—even in cases where classification is legitimate—but we are not prepared to hold that the amount of penalty imposed is so great or the length of time within which the adjustment and payment are to be made is so short that the act imposing the penalty and fixing the time is beyond the power of the state." Mr. Justice Peckham dissenting.

We think that if the South Dakota statute in question were then under consideration by the Supreme Court of the United States, a far different holding would have been made. Under the South Dakota statute the claimant may make his demand in as exorbitant an amount as he chooses, but if the company fails to make an offer and to pay the same, and fails to offer *even to a cent*, the amount the jury may declare the damages to be, the railway company is penalized in the amount double the actual damages found by the jury. If there had been a provision in the act that unless the claimant should recover the full amount claimed of the company, no penalty should be attached, there might be some justice in upholding the law. Practically enforcing this statute, the railroad company would be compelled to pay double damage in every case, the tender by the company making it absolutely certain that no *less* sum would ever be recovered by a claimant. The statute says:

"If such company shall within 60 days offer in writing to pay a fixed sum, being the full amount of the damages sustained, and the owner shall refuse to accept the same, then in any action thereafter brought for such damages, when such owner recovers a less sum as damages than the amount so offered, then such owner shall recover only his damages, and the railway company shall recover its costs."

We think it is impossible to carry out the terms of this statute so far as the railroad company is concerned. The only real way, it seems to us, would be, in order to escape the penalties. to concede the demand of claimant and pay the same within 60 days. otherwise we would be compelled to take the chance of a heavy penalty if the company fails to tender in settlement the exact amount even to a cent which the jury shall find to be the actual damages. It seems to us that such a statute is properly characterized in the language of the court in Grand Island W. C. R. Co. v. Swinbank, 51 Neb. 521, namely:

> "It is a sort of a hybrid between a display of ethical indignation and the imposition of a criminal fine."

Our position is sustained in Black v. M. & St. L. Ry. Co., supra. The language of the court in that case is, as follows:

> "It is further contended, with reference to the pigs, that there was no evidence of the value on which to predicate the recovery of double damages. But in one division of defendant's answer, relating to this cause of action, it is averred that defendant 'tenders to the plaintiff the sum of thirty-five dollars, which the plaintiff claims to be the value of the pigs, and it denies each and every other allegation in the said count of the said petition contained.' And counsel for defendant, in his opening statement, said, 'We come into court and tender Mr. Black, not the value that we claim that the pigs were, but the value he himself places upon the pigs, namely, thirty-five dollars.' Counsel's contention now seems to be that, while this tender relieved plaintiff of the necessity of proving the value of the pigs for the purpose of recovering simple damages, it did not afford the basis for the recovery of double damages. But the distinction is so subtle that we have been unable to grasp it. The plaintiff is entitled to double damages, provided he shows the statutory notice and affidavit, and failure of the railroad company to pay within 30 days; and, if the admission is sufficient to establish the value for the purpose of recovering simple damages, certainly no more evidence of value was necessary in order to entitle plaintiff to recover double damages. A payment of money into court during trial, even without a plea of previous tender, operates as a tender from that date, and admits so much of the cause of action. Ye Seng Co. v. Corbitt (D. C.), 9 Fed. 423, 431."

In the instant case defendant in error filed a notice, accompanied by an affidavit, of claim in the sum of $838..20 for damages. (Record pp. 4-5.) The amount sued for herein was the sum of $1,676.40. (Record pp. 3-4.) A verdict was rendered for the sum of $780.00 (Record p. 16), thereby showing that the claim of defendant in error was exorbitant and excessive. It will be observed in the instant case plaintiff in error made a valid and legal tender under the laws of South Dakota of $500.00 in full settlement of the claim and demand of defendant in error. (Record pp. 6-7.)

We think the case of St. L. I. M. & S. R. Co. v. Wynne, supra, is on all fours with the case at bar. In that case the court held that the statute, Act 61 of the Laws of 1907 of the state of Arkansas, providing for attorney's fee in case of recovery as construed and applied was an arbitrary exercise of the powers of government, and violative of the fundamental liability embraced within the conception of due process of law; that a recovery for penalty and attorney's fee cannot be had where complainant makes demand for more than he is entitled to recover; that when he makes an excessive demand he is in the wrong; and that the judgment of the court should be reversed.

II

It discriminates against one class of litigants in favor of another, denying to plaintiff in error equal protection of the laws.

The act in question discriminates against one class of litigants and in favor of another, and clearly denies to plaintiff the equal protection of the law. Such an attempt to grant special advantage to one class of litigants at the expense of another is unconstitutional.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150;
Williamson v. Liverpool, L. & G. Ins. Co., 105 Fed. 31;
Cotting v. K. C. Stock Yds. Co., 183 U. S. 79;
Jolliffe v. Brown, 14 Wash. 155;
Wilder v. Chicago & N. W. Ry. Co., 70 Mich. 382;
R. R. Co. v. Moss, 60 Miss. 641;
Hocking Valley Coal Co. v. Rosser, 52 Ohio St. 12;
Calder v. Bull, 3 Dall. 387-388.
Builders' Supply Depot v. O'Connor, 150 Cal. 265;
South & North Ala. R. Co. v. Morris, 65 Ala. 193;
Coal Co. v. Rosser, 53 Oh. St. 22-4.

In Builders' Supply Depot v. O'Connor, 150 Cal. 265, it was held by the Supreme Court of California that:

"A statute which gives an attorney's fee to one party in an action and denies it to the other, and allows such fee in one kind of action, and not in other kinds of actions where, as in the statute here in question, the distinction is not founded on constitutional or natural difference, is clearly violative of the constitutional provisions above noticed."

In Chicago, St. L. & N. O. R. Co. v. Moss, supra, a statute imposing upon an unsuccessful appellant a reasonable attorney's fee, although applicable to all parties, limited to railroad cases appealed from justice's court, was held to deny equal protection under the law.

In South & North Ala. R. Co. v. Morris, supra, a similar statute was held unconstitutional on the ground that justice cannot be sold or denied by the exaction of a pecuniary consideration from one, when the same is given freely to another.

In Wilder v. Chicago & W. M. R. Co.. supra, it was held that the legislature cannot make unjust distinction between classes of suitors without violating the spirit of the constitution; that a penalty imposed upon the one was a special incentive to litigation on the part of the other, and that the statute imposing penalty under guise of attorney fee was unconstitutional.

In Hocking Valley Coal Company v. Rosser, supra, a statute imposing an attorney fee upon the employer for failure to pay wages upon three days' demand was declared unconstitutional and void.

It will be observed that in most of the cases the objectionable feature of the several acts was the imposition of a reasonable charge of attorney fee on the unsuccessful litigant, which was construed as a penalty. The case at bar is much stronger in favor of the plaintiff in error than any of those cases, for the reason that a statute charging an unsuccessful litigant with an attorney fee, might possibly be construed as imposing not strictly a penalty, but rather a charge in the nature of costs. In this case we have no such difficulty to surmount. The penalty imposed is not to be part of the "costs" for an attorney fee, or any other expense in the litigation, but for a fine.

In Cotting v. K. C. Stock Yds. Co., supra, the court holds unconstitutional an act applying only to the K. C. Stock Yds. Co. and not to other companies or corporations engaged in like business, upon the ground that under its operation such company is denied equal protection of the law, and declares any law which places upon a litigant as a penalty for a failure to make good his claim or defense a burden so great as to practically intimidate him from asserting that which he believes to be his rights, is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws. In the Cotting case the Supreme Court of the United States illustrated the evil of the penalty in the Kansas law by supposing in fancy a statute which in its provisions is almost parallel with the South Dakota statute involved in the case at bar, and referred to such supposed statute as an extreme illustration, evidently not believing that any legislature would enact a statute containing such extreme and arbitrary provisions. Here we have the reality! The act in question does charge that if this railroad corporation defend this action, it should be punished by a fine equal to half of the amount of the claim, and, indeed, to the whole thereof; and this law does, by its terms, apply only to railroad corporations. Should there be the slightest hesitation in holding that this corporation is denied the equal protection of the laws? The fact that the courts are open to hear its defense is not sufficient, if upon railroad corporations and railroad corporations alone, there is visited a substantial penalty for a failure to make good their entire defense.

In the case of Gulf, etc., R. Co. v. Ellis, supra, it was held that corporations are persons within the provisions of the fourteenth amendment to the Constitution of the United States, and that a state has no more power to deny to corporations the equal protection of the law than it has to individual citizens. While it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference in situation of circumstances, that naturally suggests the justice of diverse legislation with respect to the object classified. Classification should not be made arbitrarily and without any such basis.

III

The law in its operation is pernicious and works a rank injustice.

To sum up, we urge and contend that the outrage perpetrated by this statute is convincingly established by the facts in the instant case. The damage being peculiarly within the knowledge of the claimant, and within his knowledge alone, the amount and value thereof is to be determined by him, and the railroad corporation must necessarily accept or reject his statement of the amount and value of the loss and damage at its peril.

There is no duty *first* imposed upon the railroad corporation—the only duty is that *after* loss and damage—wholly unavoidable and without negligence. Then the railroad corporation sets about to ascertain the actual value of the property lost or destroyed, the value of which is peculiarly within claimant's own knowledge. How difficult for the railway company! It is embarking on a sea of uncertainty and must venture a guess as to the value of the loss or damage. If claimant recovers a sum *less* than claimed, but recovers *just the amount* offered by the railway corporation, yet the company must pay double the amount and thereby be penalized. Claimant may offer no evidence as to value, but rely on the offer of the railroad corporation, and then that amount must be doubled, and thus it is apparent there never would be a case where a railroad corporation would not be liable and required to pay double damages under the statute in question. What a rank injustice! The railroad company can only escape the payment of double damages provided by the act by making a tender and offer to the owner of the property lost or destroyed, of an amount in excess of the actual damages sustained by him. The statute does not provide that the railway corporation then pay the owner his actual damages in settlement of the claim, a right and privilege accorded to every other party or litigant. To illustrate: A suffers damage by fire set out by a locomotive. The amount of his damage is peculiarly within his own knowledge, and he fixes the amount at his own pleasure. The railroad company, on presentation of the claim, must either pay or decline payment. After investigation on its part it cannot escape liability for double damages by tendering to the claimant the full amount of his loss, as the statute allows him double damages in all cases except where he recovers a verdict for *less than the amount tendered*. The result is that the railroad company, after ascertaining the actual damage which the claimant has suffered, must, in making a tender or offer, make a donation to him of a part of its property, or suffer double damages at the hands of the court, and this, it should be borne in mind, without any wrong doing or negligence upon the part of the railroad company; but after it has taken every precaution known to the railroad world to avoid inflicting the injury of which complaint is made. It seems to us that such a statute is plainly at war with every principle of natural justice, which is the aim of all courts to administer. In other words, the statute in question denies to the railroad corporation the right to defend against an excessive demand, except upon the condition that the railroad corporation shall submit to the arbitrary imposition of a penalty by way of double damages in case it has not, before the trial of the case, tendered to the defendant a larger amount than the jury finds is the actual damages which is sustained, thereby denying to the railroad corporation free access to the courts, which is allowed and permitted to opponent and claimant. It must be conceded that no duty can be imposed upon a railroad company to perform the impossible. It should be remarked that the statute makes no distinction between a fire negligently set out and one caused, regardless of every precaution to prevent it, and the penalty of double damages is imposed in the latter, as well as in the former instance. Further, defendant in error demanded for his damage the sum of $838.20. The verdict of the jury was for $780.00, and judgment was rendered for the sum of $1,560.00, being double the amount of the verdict, together with interest and costs, making a total of $1,715.35.

It is conclusive, then, that the refusal of plaintiff in error to pay the sum demanded was justifiable, and that its defense was meritorious. There was, in fact, much better reason for the corporation's defense than for plaintiff's action; but under this statute the plaintiff in error must pay a penalty either way. For resisting such penalty, the plaintiff in error must pay twice the amount of the actual damage sustained. It would seem that a claimant who makes an honest claim and is paid, receives only the amount of his damages, but that a plaintiff who demands much more than his due, may recover twice the amount of his actual damage, if the corporation refuses to accede to his demand.

Finally, we most strongly urge and contend that neither of the sections of the act can be sustained. Even if it should be held that the sections are separable, the elimination of either will, we think, not save the other. The subject of section one is not expressed in the title and must, therefore, fall. The elimination of section one will not cure, in our judgment, the defect in section two, which is, as we have heretofore and throughout this brief contended, an unwarranted imposition of a penalty without due process of law and without the equal protection of the laws.

Wherefore plaintiff in error prays that the judgment and decision of the Supreme Court of the state of South Dakota be in all things reversed, annulled and altogether held for naught, and that it be restored to all things which it has lost thereby, as well as by the said judgment and decision of the Circuit Court of Aurora county, and for such further relief in the premises as may be just and proper.

Respectfully submitted,

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CITATION OF AUTHORITIES

The act is unconstitutional in that it imposes a penalty for delinquency in the payment of a debt.

A. T. & S. F. Ry. Co. v. Matthews (Kan.), 174 U. S. 96;
Black v. M. & St. L. Ry. Co., 122 Ia. 32;
County of San Mateo v. S. P. R. Co. (Cal.), 13 Fed. 722-782;
Denver & R. G. R. Co. v. Outcalt, 2 Colo. App. 187;
Grand Island & W. C. R. Co. v. Swinbank, 51 Neb. 521;
Gulf, Calif. & S. F. Ry. Co. v. Ellis, 165 U. S. 150;
Hurtando v. California, 110 U. S. 535-537;
Jolliffe v. Brown, 14 Wash. 155;
Railroad Tax Cases, 13 Fed. 722-782;
St. L. I. M. & S. Ry. Co. v. Wynne (Ark.), 224 U. S. 258;
Stupeck v. U. Pac. R. Co., 200 Fed. 192;
Seaboard Air Line v. Seegers, 207 U. S. 73;
U. P. Ry. Co. v. DeBusk, 12 Colo. 294;
Wadsworth v. U. P. Ry. Co., 19 Colo. 600.

The act is unconstitutional in that it discriminates against one class of litigants in favor of another, denying to plaintiff in error equal protection of the laws.

Coal Company v. Rosser, 53 Oh. St. 22-24;
Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641;
Cotting v. K. C. Stock Yards Co., 183 U. S. 79;
Hocking Valley Coal Co. v. Rosser, 52 Oh. St. 12;
S. & N. Ala. R. Co. v. Morris, 65 Ala. 193;
Williamson v. Liverpool L. & G. Ins. Co., 105 Fed. 31;
Wilder v. C. & N. W. Ry. Co., 70 Mich. 382.